(1)

No. 95-5207-CSY
Status: GRANTED
CAPITAL CASE

Title: Byron Keith Cooper, Petitioner
v.
Oklahoma

Docketed:
July 13, 1995

Court: Court of Criminal Appeals
of Oklahoma

Counsel for petitioner: Ravitz,Robert A.

Counsel for respondent: Howard,Sandra D.

Entry	Date	Note	Proceedings and Orders
1	May 1 1995	G	Application (A94-825) to extend the time to file a petition for a writ of certiorari from May 14, 1995 to July 13, 1995, submitted to Justice Breyer.
2	May 2 1995		Application (A94-825) granted by Justice Breyer extending the time to file until July 13, 1995.
3	Jul 13 1995	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
6	Aug 14 1995		Brief of respondent Oklahoma in opposition filed.
5	Aug 17 1995		DISTRIBUTED. September 26, 1995 (Page 99)
8	Oct 2 1995		REDISTRIBUTED. October 6, 1995 (Page 24)
10	Oct 5 1995		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 16, 1995. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 15, 1995. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 3, 1996. Rule 29.2 does not apply. **********
11	Nov 1 1995		SET FOR ARGUMENT WEDNESDAY, JANUARY 17, 1996. (2ND CASE)
13	Nov 14 1995		Joint appendix filed.
14	Nov 14 1995		Brief of petitioner filed.
15	Nov 16 1995	G	Motion of American Association on Mental Retardation, et al. for leave to file a brief as amici curiae filed.
16	Nov 16 1995	G	Motion of National Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae filed.
17	Nov 27 1995		CIRCULATED.
18	Dec 4 1995		Motion of American Association on Mental Retardation, et al. for leave to file a brief as amici curiae GRANTED.
19	Dec 11 1995		Motion of National Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae GRANTED.
20	Dec 14 1995	X	Brief of respondent Oklahoma filed.
21	Dec 14 1995	X	Brief amici curiae of Utah, et al. filed.
22	Dec 14 1995		LODGING consisting of one set of photocopies of Connecticut legislative history submitted by counsel for amici Utah, et al.
23	Jan 3 1996	X	Reply brief of petitioner Byron Keith Cooper filed.
24	Jan 4 1996		Record filed.
		*	Original record proceedings Supreme Court of Oklahoma

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No. 95-5207-CSY

Entry	Date	Note	Proceedings and Orders
25	Jan 17 1996		and District Court (BOX) ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

NO. 95-5207

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Supreme Court, U.S.
FILED
JUL 13 1995
OFFICE OF THE CLERK

BYRON KEITH COOPER,

Petitioner,

-v-

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

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43 pp

QUESTION PRESENTED

May a state, consistent with the Eighth and Fourteenth Amendments, allocate a level of proof as high as clear and convincing evidence on a defendant in determining his competency to stand trial?

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NO.

IN THE

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OCTOBER TERM, 1995

BYRON KEITH COOPER,

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-v-

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

To: The Honorable Chief Justice and Associate Justices
of the United States Supreme Court

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals entered in this case on the 10th day of January, 1995.

OPINION BELOW

The Opinion of the Court of Criminal Appeals is published and may be found at 889 P.2d 293 (Okl.Cr.1995) (affirming on direct appeal Petitioner's first degree murder conviction and death sentence). The Opinion is attached to this Petition as Appendix "A".

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The judgment of the Oklahoma appellate court was entered January 10, 1995. Petition for Rehearing was denied February 13, 1995. A copy of the Order Denying Rehearing is attached hereto as Appendix "B". By order of this Court, Petitioner was granted until July 13, 1995, to file his Petition herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV §1 (excerpt):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Okla. Stat. tit. 22, § 1175.4(B) (Supp.1994) (excerpt):

> The court, at the hearing on the application, shall determine, by clear and convincing evidence, if the person is incompetent. The person shall be presumed to be competent for the purposes of the allocation of the burden of going forward with the evidence.

STATEMENT OF THE CASE

The Petitioner, Byron Keith Cooper, was charged in Oklahoma County Case Number CRF-89-5084 with Murder in the First Degree. The death penalty was sought by the prosecution. On May 22, 1992 the jury found the Petitioner guilty of the charge and assessed the penalty of death. On June 5, 1992 the trial court formally imposed the Judgment and Sentence. The Oklahoma Court of Criminal Appeals delivered its Opinion in said cause on January 10, 1995, wherein Petitioner's conviction and death sentence were affirmed.

In affirming Petitioner's sentence of death, the Oklahoma Court of Criminal Appeals rejected Petitioner's argument that by placing a burden of proof on him of clear and convincing evidence to determine incompetency his Eighth and Fourteenth Amendment rights were violated. The Court of Criminal Appeals held that "forcing a criminal defendant to prove by clear and convincing evidence he is incompetent is not subject to proscription under the Due Process Clause, because it does not "offend some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental. Medina, 505 U.S. at ___." Cooper v. State, 889 P.2d 293 (Okl.Cr.1995).

REASON FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the issue of whether a state may, consistent with the Eighth and Fourteenth Amendments, allocate a level of proof as high as clear and convincing evidence on a defendant in determining his competency to stand trial.

In Oklahoma, the competency statutes mandate that an accused is presumed competent, as a matter of law, and has the burden of

proving incompetency (and disproving competency). The court shall determine by clear and convincing evidence if the defendant is incompetent. Okla. Stat. tit. 22, § 1175.4(B) (Supp.1994). A clear and convincing burden placed on an accused to prove incompetency is such a harsh standard that it violates Petitioner's right to due process under the Fourteenth Amendment.

Prior to trial, in August, 1990, Petitioner was examined by state psychologist Dr. Edith King and determined by the court to be incompetent to stand trial. (C.H. 4, 32). Petitioner was sent to Eastern State Hospital in Vinita, Oklahoma, to receive psychiatric treatment before trial. Upon his return from Vinita, Petitioner underwent a post-competency hearing to determine if he was, at that time, competent to proceed with the action against him. (C.H. 3) (Dec. 20, 1990; Jan. 18, 1991). The court determined that, under Oklahoma law, Petitioner was competent to stand trial. (C.H. 101) (Dec. 20, 1990; Jan. 18, 1991). Thereafter, prior to trial, Petitioner had another hearing on his competency after appearing in jail coveralls and saying his clothes his attorney brought were burning him. Additionally, Petitioner's hair was poked out and going in every direction and "he looks like heck" according to his counsel. (C.H. 3, 4) (May 4, 5, 1992).

The court, in determining Petitioner's competency, noted:

> THE COURT: Well, it looks to me like 1175.4, A, paragraph B says, "the court at the hearing on the application -- ", which is what we just completed, "shall determine by clear and convincing evidence if the person is incompetent. The person shall be presumed to be competent for the purpose of the allocation of the burden of proof and burden of going forward with the evidence."

> Well, I think I've used the expression, I know I've talked to Mr. Mildfelt and said in the past that normal is like us. Anybody that's not like us is not normal, so I don't think normal is a proper definition that we are to use within competence. My shirtsleeve opinion of Mr. Cooper is that he's not normal. Now, to say he's not competent is something else.
>
> I respect Dr. Murphy and I don't dispute Dr. Murphy's diagnosis. He examined Mr. Cooper under adverse circumstances and hastily and has seen just a limited exposure to Mr. Cooper. I don't fault him for that. From what he observed, he's probably accurate.
>
> But you know, all things considered, I suppose it's possible for a client to be in such a predicament that he can't help his lawyers, he can't help his defense and still not be incompetent. I suppose that's a possibility, too.
>
> I think it's going to take smarter people than me to make a decision here. I'm going to say that I don't believe he has carried the burden by clear and convincing evidence of his incompetency and I'm going to say we're ready to go to trial. (C.H. 271, 272) (May 4, 5, 1992). (emphasis added)

This Court has consistently ruled that state laws controlling competency procedures must be "adequate" to provide meaningful and reliable safeguarding of an accused's right not to be subjected to criminal prosecution while incompetent. Medina v. California, 505 U.S. ___, 112 S.Ct. 2572 (1992), rehearing denied, 113 S.Ct. 19 (1992); Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896 (1975); Pate v. Robinson, 383 U.S. 375, 277, 86 S.Ct. 836, 838 (1966); U.S. Const. amends. V, VI, VIII, XIV.

The clear and convincing standard of proof required of a defendant is unconstitutional in that it fails to provide anticipatory, protective procedures which minimize the risk that an incompetent person will be subjected to criminal procedures and offends the recognized principles of fundamental fairness. It violates "powerful social standards of a progressive society."

Medina v. California, 112 S.Ct. 2572, 2582 (1992) (Justice O'Connor and Justice Souter concurring in judgment).

Petitioner was forced to attempt to prove that he was incompetent at the time of trial by evidence which is "clear and convincing." Okla. Stat. tit. 22, § 1175.4(B) (Supp.1994). Oklahoma standard jury instructions define the burden of proof followed by the judge in the instant case:

> When I say that a party has the burden of proving any proposition by clear and convincing evidence, I mean that you must be persuaded, considering all the evidence in the case, that the proposition on which the party has this burden of proof is true, and that this conclusion is **unmistakable** and free from serious or substantial doubt as to its correctness. OUJI-CIV 3.2 (emphasis added)

Invoking this standard of proof resulted in the failure of Petitioner's strong argument of incompetency, because it was not strong enough to hurdle the burden of being "unmistakable."

The correct burden of proof that should have been applied in Petitioner's competency proceeding, is that of a preponderance of the evidence, which is defined as being more probably true than not true. The stricter standard of "clear and convincing" invoked by Oklahoma constitutes an inadequate anticipatory protective procedure, and is therefore violative of the Petitioner's rights to due process pursuant to U.S. Const. amend. XIV.

The case of Medina v. California, 505 U.S. ___, 112 S.Ct. 2572 (1992), rehearing denied, 113 S.Ct. 19 (1992), deals with placement of the burden of proof in competency proceedings. In Medina, this Court held that the California statute, which mandated a defendant to prove his competency, did not violate fundamental fairness as

required by the Due Process Clause of U.S. Const. amend. XIV. The major factor that distinguishes Medina from the facts presently at issue, is that the California statute only required **preponderance of the evidence** as the standard of proof, while the Oklahoma statute requires **clear and convincing evidence** as its standard of proof.

In the present case, Petitioner was determined by the court to be incompetent to stand trial in August, 1990. It is therefore against fundamental principles of fairness to demand that Petitioner take responsibility for proving by clear and convincing evidence his incompetency in further competency proceedings, when it has been established that his ability to do so is questionable.

Petitioner, after he was adjudicated incompetent, was required to prove that he was still incompetent by clear and convincing evidence. Although a Legislature has the power to decide the allocation of the burdens of producing evidence and of persuasion, it is not empowered to allocate these burdens in a way that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 1341 (1958).

In litigation, it is clear the level of the burden of proof may be the determinative factor in the outcome of an issue. Cf. Speiser v. Randall, 357 U.S. at 525, 78 S.Ct. at 1342 (1958). Placing a clear and convincing burden on a defendant, especially one who has already been determined incompetent, places a substantial risk that an incompetent individual may be convicted or

executed. This procedure flies in the face of the notions of fundamental fairness in the judicial system, in that it is the exact opposite of what due process guarantees to an accused. U.S. Const. amend. XIV.

Subjecting Petitioner to a criminal proceeding, especially one for which death is the penalty, without a fair and constitutional finding that Petitioner was competent to stand trial, violates due process, and constitutes cruel and unusual punishment pursuant to U.S. Const. amends. VIII and XIV.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BYRON KEITH COOPER,
Petitioner,

-v-

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

APPENDIX "A"

Original Opinion of the Oklahoma Court of Criminal Appeals

Cooper v. State, 889 P.2d 293 (Okla. Crim. App. 1995)

Further, the crime of robbery is "a wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." 21 O.S.1991, § 791. Second, the crime of Unlawful Wearing of a Mask while in Commission of a Felony was completed when Appellant, while masked, assaulted the cashier with a firearm. 21 O.S.1991, § 1303. These crimes consist of "separate and distinct elements, none of which merge into proof of any of the others." *Ziegler v. State*, 610 P.2d 251, 254 (Okl.Cr. 1980). Because each crime plainly requires proof of different facts, the prosecution for each of these crimes was not barred by the state and federal prohibitions against double jeopardy. *Posey*, 805 P.2d at 688.

[8] In his third assignment of error, Appellant argues that the trial court erred by not granting a severance based upon *Neill v. State*, 827 P.2d 884, 886 (Okl.Cr.1992). In *Neill*, this Court stated:

> The decision to grant or deny severance is left to the sound discretion of the trial court. This Court has recognized that it is in the interest of both justice and economy to jointly charge and try those who have allegedly participated in the same criminal act, and we have urged trial courts to do so whenever possible. Absent an abuse of discretion resulting in prejudice to the appellant, the decision of the trial court will not be disturbed on appeal....
>
> We have determined that one defendant's attempt to cast blame on the other is not in itself a sufficient reason to require separate trials.... Mere conflicting defenses, standing alone, do not constitute the showing of prejudice necessary for judicial severance....
>
> However, antagonistic defenses may require that defendants be tried separately....
>
> ... "defenses are antagonistic where each defendant is attempting to exculpate himself and inculpate his co-defendant."

Id. at 886–87 (citations omitted). In the present case, both Appellant and his co-defendant, Juanett Ramsey, presented a defense to the effect that he or she, respectively, did not commit the offense and did not know who did. These defenses do not constitute mutually antagonistic defenses as the trier of fact was not necessarily required to disbelieve the defense of one to believe the defense of the other. *Id.* at 887. The trial court, therefore, did not abuse its discretion in denying a severance. *See e.g. Funkhouser v. State*, 734 P.2d 815, 817–818 (Okl.Cr.1987).

For the reasons set forth in this opinion, Appellant's Judgment and Sentence for Robbery with Firearms and Unlawful Wearing of a Mask while in Commission of a Felony should be, and hereby is, **AFFIRMED.**

LUMPKIN, P.J., and JOHNSON, V.P.J., and STRUBHAR, J., concur.

CHAPEL, J., specially concurs.

WEST KEY NUMBER SYSTEM

Byron Keith COOPER, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. F-92-533.

Court of Criminal Appeals of Oklahoma.

Jan. 10, 1995.

Rehearing Denied Feb. 13, 1995.

Defendant was convicted in the District Court, Oklahoma County, Richard J. Freeman, J., of first-degree murder, and he was sentenced to death. Defendant appealed. The Court of Criminal Appeals, Lumpkin, P.J., held that: (1) requiring defendant to prove incompetency by clear and convincing evidence did not violate his due process rights; (2) evidence supported finding of competence; (3) two venire members were properly excused during voir dire based upon their reluctance to impose death sentence; (4) judicial decision regarding propriety of flight instruction did not apply retroactively to defendant; (5) defendant did not receive

ineffective assistance of counsel; (6) unadjudicated murder could be used to prove defendant was continuing threat to society; (7) fact that defendant was on preparole conditional supervision at time of murder supported finding that murder was committed while serving sentence of imprisonment; and (8) death sentence was factually substantiated and appropriate, and was not imposed under influence of passion, prejudice, or any other arbitrary factor.

Affirmed.

1. Constitutional Law ⇐266(7)

Presumption of competency and requiring defendant to prove incompetency by clear and convincing evidence did not violate his right to due process. U.S.C.A. Const. Amend. 14; 22 Okl.St.Ann. § 1175.4, subd. B.

2. Constitutional Law ⇐48(1)

Statutes are presumed to be constitutional and person alleging their unconstitutionality has burden of proof.

3. Constitutional Law ⇐251.3, 253.2(1)

Law is "due process" when it operates on all alike during regular course of its administration through courts, and does not subject one to arbitrary exercise of powers of government. U.S.C.A. Const.Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

4. Constitutional Law ⇐251.6

Due process is satisfied if defendant has notice and right to be heard at public proceeding at which all constitutional and statutory provisions are observed according to those rules and forms which have been established for protection of private rights, in such a way that it operates on all alike. U.S.C.A. Const.Amend. 14.

5. Mental Health ⇐432

Two questions must be addressed in determining competency: first, whether defendant was able to understand nature of charges and proceedings brought against him, and second, whether defendant had ability effectively and rationally to assist in his defense.

6. Criminal Law ⇐494, 625.15

Expert testimony of psychiatrist who conducted screening interview with defendant when he entered hospital for examination and statements of defendant reflected in hospital records supported determination that defendant was competent, despite defense expert testimony that defendant appeared to display thought disorder, with possible auditory and visual hallucinations, and that he did not appear competent on day of hearing.

7. Criminal Law ⇐625.15

Lay testimony of jailers that they had not noticed anything strange about defendant, such as compulsive cleaning of his cell, smearing feces on his face, or talking while no one was there, and that defendant communicated normally with other inmates and seemed to be aware of his surroundings, and evidence that defendant had filed two pro se civil rights complaints in federal court and appeared to read responses enough to understand their contents when they were served on him in jail, supported determination that defendant was competent at second competency hearing, despite testimony from other inmates regarding defendant's conduct and psychologist's testimony that defendant suffered from major affective disorder that kept him from communicating with his counsel.

8. Criminal Law ⇐494, 625.30

In determining competency of defendant, trial court was not required to give controlling effect to opinion of defense expert, and could instead find in accord with state's lay witnesses.

9. Attorney and Client ⇐109

Trial counsel were not required to consult with defendant, who was not speaking to them, before waiving defendant's right to have jury determine competency. 22 Okl.St. Ann. § 1175.4.

10. Jury ⇐131(13)

Prosecutor's voir dire examination regarding whether venire members could come to conclusion about what "reasonable doubt" meant did not amount to improper attempt by prosecutor to define "reasonable doubt."

11. Jury ⇐108

Venire member who stated that she could consider death penalty, but that she could not put anyone to death, was properly excused for cause from capital murder prosecution.

12. Jury ⇐108

Venire member who initially stated that she could "probably" agree on verdict imposing death, but who later stated that she did not think she would be able to, was properly excused for cause from capital murder prosecution.

13. Jury ⇐33(2.15)

Use of "death qualification" voir dire questions in capital murder prosecution did not violate defendant's constitutional rights.

14. Courts ⇐100(1)

Decision of Court of Criminal Appeals in *Mitchell v. State*, declaring improper court's giving flight instruction in cases where defendant did not explain his departure, did not apply retroactively to defendant who was convicted of first-degree murder and sentenced to death before decision was issued; trial court properly relied on prior standard of giving instruction, requiring prospective application would place defendant in same situation as those seeking postconviction relief, eliminating inherent inequality resulting between appellants whose appeals were separated only by time, and prospective application would eliminate inherent unfairness which clear break with prior existing case law can place on trial court, which gave instruction in good faith.

15. Criminal Law ⇐1172.6

Any error in giving flight instruction in capital murder prosecution, despite fact that defendant did not explain his departure, was not reversible error, where flight instruction was not based on defendant's flight from crime, but his flight from police several days after crime, when he was carrying device commonly used to smoke crack cocaine; flight would tend to show defendant committed crime of possession of drug paraphernalia, with which he was not charged, rather than murder.

16. Criminal Law ⇐789(1)

Defendant was not entitled to have jury instructed on meaning of "reasonable doubt" in capital murder prosecution.

17. Criminal Law ⇐438(7)

Photograph of murder victim showing position of body after it had been rolled off its side and displaying characteristics of body which had been left unattended for four days, and photographs of another murder victim showing her as she was found half-nude in her residence and depicting injury caused by ramming of knife-sharpening tool into her neck, were not excludable from capital murder prosecution as unduly gruesome.

18. Criminal Law ⇐641.13(2.1)

If defendant was competent and was merely malingering, any lack of communication with counsel was solely defendant's fault, and counsel could not be found to have provided ineffective assistance based upon such lack of communication. U.S.C.A. Const. Amend. 6.

19. Criminal Law ⇐641.13(5)

Trial counsel did not provide ineffective assistance in capital murder prosecution when he shared his belief with trial court that defendant was "faking" incompetence, where statement was made after first but before second competency hearing, and counsel recanted statement before second competency hearing. U.S.C.A. Const.Amend. 6.

20. Criminal Law ⇐641.13(5)

Trial counsel did not provide ineffective assistance in capital murder prosecution in failing to obtain another expert for postexamination competency hearing, as record was virtually brimming with evidence that defendant was malingering. U.S.C.A. Const. Amend. 6.

21. Criminal Law ⇐796

In capital murder prosecution, defendant was not entitled to have jury instructed that it had option to return life sentence regardless of its findings of aggravating circumstances.

22. Criminal Law ⇐796

In capital murder prosecution, defendant was not entitled to have jury instructed that it could consider sympathy for defendant in assessing punishment.

23. Criminal Law ⇐798(.5)

In capital murder prosecution, defendant was not entitled to have jury instructed that its findings concerning mitigating circumstances did not have to be unanimous.

24. Criminal Law ⇐796

In capital murder prosecution, antisympathy instruction did not improperly permit jurors to ignore mitigating evidence.

25. Homicide ⇐311

In capital murder prosecution, instruction defining "heinous, atrocious or cruel" as aggravating circumstance sufficiently channelled jury's discretion to satisfy constitutional requirements. U.S.C.A. Const. Amends. 8, 14.

26. Homicide ⇐357(8)

Finding as aggravating circumstance, during penalty phase of capital murder prosecution, that defendant killed victim to avoid arrest or prosecution for burglary was supported by evidence that defendant had previously been convicted of robbing two men whom he had allowed to live, who were able to give description that ultimately allowed defendant to be captured and imprisoned, tending to show reluctance to allow another victim to live, and evidence that defendant pulled down shades during burglary of victim's house and wiped down what was probably murder weapon, tending to show defendant did not want to be detected or identified by anyone.

27. Homicide ⇐357(8)

In capital sentencing proceeding, existence of aggravating circumstance that purpose of killing was to avoid arrest or prosecution is determined by looking at killer's intent, and in absence of killer's own statements of intent, such evidence may be inferred from circumstantial evidence.

28. Criminal Law ⇐1130(5)

Defendant's claim that "avoiding arrest" aggravating circumstance was applied in capital sentencing proceedings in standardless, ad hoc fashion would not be considered on appeal, where defendant did not support his contention with relevant argument and citations of authority, but instead made vague references to other aggravating circumstances he claimed were also unconstitutionally vague. 21 Okl.St.Ann. § 701.12, subd. 5.

29. Homicide ⇐357(6)

Prosecution resulting in conviction was not required for evidence of unadjudicated murder committed by defendant to be admissible during penalty phase of capital murder prosecution in support of aggravating circumstance that probability existed defendant would commit criminal acts of violence that would constitute continuing threat to society. 21 Okl.St.Ann. § 701.12, subd. 7.

30. Homicide ⇐357(6)

In capital sentencing proceeding, "continuing threat" aggravating circumstance was not vague and overbroad.

31. Criminal Law ⇐1206.1(2)

Death penalty procedure was not unconstitutional for allowing prosecutor to have unbridled discretion in determining whether to seek death penalty.

32. Homicide ⇐357(5)

Defendant who was admitted to preparole conditional supervision program at time of murder, and who thus was not actually confined within prison walls, was nevertheless subject to aggravating factor, under capital sentencing scheme, that murder was committed while serving sentence of "imprisonment" on conviction of a felony; defendant was "imprisoned" as that term is commonly defined, and he had notice of that status, in light of earlier cases indicating one need not be behind bars to be imprisoned, and fact that conditions of preparole conditional supervision were explained to him when he was released from correctional facility. 21 Okl. St.Ann. § 701.12, subd. 6.

See publication Words and Phrases for other judicial constructions and definitions.

33. Criminal Law ⇐1208.1(6)

Statutory requirement that jury list aggravating circumstances as specific findings of fact before death penalty may be imposed does not run afoul of constitutional prohibition against special verdict. Const. Art. 7, § 15.

34. Homicide ⇐357(5, 8, 11)

Death sentence for conviction of first-degree murder was factually substantiated and appropriate, and was not imposed under influence of passion, prejudice, or any other arbitrary factor, considering in aggravation that defendant was previously convicted of felony involving use of threat of violence to the person, that murder was especially heinous, atrocious, or cruel, that it was committed for purpose of avoiding or preventing lawful arrest or prosecution, that it was committed while defendant was serving sentence of imprisonment on conviction of felony, and that there was probability that defendant would commit criminal acts of violence that would constitute continuing threat to society, and considering in mitigation defendant's poor home life, which included episodes of violence and abuse, his history of institutionalization, and his drug addiction. 21 Okl.St. Ann. § 701.12, subds. 1, 4–7.

35. Homicide ⇐357(5)

Finding as aggravating factor, in capital murder prosecution, that defendant was previously convicted of felony involving use or threat of violence to the person was supported by testimony of victims of robbery and car theft previously committed by defendant that defendant pointed pistol at them and angrily threatened to blow their heads off if they did not give him their money and car keys, and by evidence that defendant had broken into another victim's apartment and was discovered holding electrical cord he had ripped from appliance in apartment, apparently intending to use cord in some manner against victim. 21 Okl.St.Ann. § 701.12, subd. 1.

36. Homicide ⇐357(6)

Finding as aggravating circumstance, in capital murder prosecution, that there was probability that defendant would commit criminal acts of violence that would constitute continuing threat to society was supported by evidence of defendant's connection to another murder, of his conduct in seriously beating fellow inmate while in county jail, and of discovery of home-made ice pick in defendant's cell. 21 Okl.St.Ann. § 701.12, subd. 7.

37. Homicide ⇐357(11)

Finding as aggravating circumstance, in capital murder prosecution, that murder was especially heinous, atrocious, or cruel was supported by evidence of stab wounds in victim's abdomen and neck, which indicated they might have been made from someone behind victim, evidence of cuts on victim's hand, indicating he struggled to fend off knife, medical examiner's testimony that death was not immediate and that victim could have lived for another 30 minutes, and evidence of location of blood around crime scene, indicating victim did not immediately lose consciousness after being stabbed repeatedly, but rather moved around room. 21 Okl.St.Ann. § 701.12, subd. 4.

An Appeal from the District Court of Oklahoma County; Richard J. Freeman, District Judge.

Byron Keith Cooper, Appellant, was tried by jury and convicted of Murder in the First Degree (21 O.S.Supp.1982, § 701.7(A)) in Case No. CRF–89–5084–7, in the District Court of Oklahoma County. The jury found the existence of five aggravating circumstances and recommended punishment of death. The trial court sentenced accordingly. From these judgments and sentences Appellant has perfected this appeal. The Judgment and sentence for First Degree Murder is **AFFIRMED.**

Robert A. Ravitz, Public Defender, Robert Mildfelt, Asst. Public Defender, Oklahoma City, Trial Counsel for appellant.

Brad Miller, Kayce Gisinger, Asst. Dist. Attys., Oklahoma City, Trial Counsel for appellee.

Pamela Wagner, Asst. Public Defender, Oklahoma City, Appellate Counsel for appellant.

Susan Brimer Loving, Atty. Gen., A. Diane Blalock, Asst. Atty. Gen., Oklahoma City, Appellate Counsel for appellee.

OPINION

LUMPKIN, Presiding Judge:

Appellant Byron Keith Cooper was tried by jury and convicted of Murder in the First Degree (21 O.S.Supp.1989, § 701.7) in the District Court of Oklahoma County, Case No. CF–89–5084. The jury found the existence of five (5) aggravating circumstances (Appellant was previously convicted of a felony involving the use or threat of violence; the murder was especially heinous, atrocious and cruel; the murder was committed to avoid arrest or prosecution; the murder was committed while Appellant was serving a sentence for a conviction of a felony; and Appellant posed a continuing threat to society) and recommended punishment of death. The trial court sentenced accordingly. From this judgment and sentence Appellant has perfected this appeal. We affirm.[1]

I. FACTS

Eighty-six-year-old Harold Sheppard was found dead in his home at Northeast 13th and Fonshill streets by a friend who was helping him with plans to renovate his home. The victim's wife had died years earlier and his daughter lived in another state. Mr. Sheppard lived only with his little dog which authorities found protecting the victim's body. He was found on September 8, 1989; based on interviews with people in the neighborhood, authorities estimate he died on September 4, after being stabbed to death that same evening.

A former cocaine dealer who sold drugs in the area frequented by Appellant witnessed Appellant's arrest by detectives on September 19. The dealer testified that a week or two before the arrest, Appellant had approached him, showed him a credit card with someone else's name on it, and offered to purchase merchandise in exchange for cocaine. The dealer could not remember the name on the credit card, but remembered the first name started with "H." The dealer initially refused; but after Appellant persisted, said he could use a watch. A short time later that same day, Appellant returned with a gold Seiko watch. An acquaintance who happened to be present during the exchange said he wanted a watch, too. Appellant told him he would get him one.

On September 5, the day after Mr. Sheppard was killed, Appellant used Mr. Sheppard's J.C. Penney credit card to purchase watches. One watch, a gold Seiko, was bought at the J.C. Penney store in Shepherd Mall; the other at the Penney store in Crossroads Mall. Both were purchased the same day. Authorities became aware of the purchases less than two weeks later, when the victim's daughter received the bill for the purchases. The clerk at the Shepherd Mall store remembered the purchase at her store. In fact, she was suspicious because Appellant did not look like the kind of customer to whom Penney would issue a credit card. She attempted to call Harold Sheppard, the name on the card, during the remainder of the week; no one ever answered the telephone. She later gave authorities Appellant's description and a composite drawing, which was distributed to law enforcement personnel.

On September 19, detectives spotted Appellant in the vicinity of Northeast 4th and Laird. When they turned their car around to investigate further, Appellant began running from them. When he was apprehended a short time later, he was carrying a portion of a car antenna commonly used as a pipe to smoke crack cocaine.

Appellant was questioned by authorities for several hours. During the interrogation, Appellant admitted murdering not only Harold Sheppard, but also Monteen Warner, whose body was discovered on September 17, 1989 at her home at 1021 Northeast 6th Street (evidence of the Warner homicide was not presented until the second stage). However, Appellant also retracted the admissions, and denied being inside either residence. Appellant denied being involved in a murder at 13th and Fonshill, despite the fact detectives had not told him Mr. Sheppard's

1. In so doing, we note the following: this case was filed December 7, 1992; it was fully briefed and at issue April 4, 1994; and it was submitted

house was located at that intersection and despite the fact Appellant told the detectives he had not heard anything about the murders in the news media. Toward the end of the interview, Appellant conceded he may have committed the murders, but could not remember.

Appellant had been staying with Walter Sam Ray, a man he met in prison. At that apartment, authorities found two box-type cameras which Mr. Sheppard's daughter identified as belonging to her father. Also found at the apartment was a watch which had belonged to Mr. Sheppard. Using chemical reagents, technical investigators discovered traces of blood on a shoe, sock and blue jeans, all belonging to Appellant and all found in a box of Appellant's belongings in Ray's apartment. Two hairs which were microscopically consistent with Mr. Sheppard were also found on one of Appellant's shoes found at the apartment.

At Mr. Sheppard's house, authorities found Appellant's fingerprints on a flashlight, a metal can, a watch case, and a carton of Salem cigarettes, the brand Mr. Sheppard smoked. Appellant's prints were also found on the charge receipt he signed at the Shepherd Mall J.C. Penney store. Authorities found a Viceroy brand cigarette butt on the kitchen floor. Appellant had a pack of Viceroy brand cigarettes when he was apprehended. Appellant is a non-secretor, meaning his blood type cannot be discovered in other bodily fluids such as saliva. No blood type could be detected from the Viceroy cigarette butt, indicating that if saliva were left on it, the person who did so could be a non-secretor.

Appellant in the police interview could not explain how his fingerprints could have been placed on the items in Mr. Sheppard's house. However, he did say if he had killed the man, his prints should have been found on the weapon, and he was certain they would not be. Authorities found a butcher knife in the draining board in the victim's kitchen. No prints were found on the knife, and there was no visible blood; however, when a chemical reagent was sprayed on the knife, the blade exhibited swipe marks which would be exhibited if blood on the blade had been wiped off.

II. PRE-TRIAL ISSUES

A.

[1] For his first proposition, Appellant complains the authority used to determine competency is unconstitutional. A sizeable portion of pretrial proceedings focused on Appellant's competency. His attorneys complained he would not communicate with them and that he thought his lead attorney was a devil who wanted him dead. A non-jury competency hearing was afforded Appellant in December 1990 and January 1991 pursuant to sections 1175.1 through 1175.8 of Title 22, at the conclusion of which Appellant was adjudged competent to stand trial.

Appellant acknowledges a hearing was held, but complains the presumption of competency, combined with the requirement he show incompetency by "clear and convincing" evidence, 22 O.S.Supp.1985, § 1175.4(B), is such a harsh standard it is violative of his right to Due Process of Law. He argues the standard of proof on him should have been preponderance of the evidence.

[2] It is a basic precept that statutes are presumed to be constitutional and the person alleging their unconstitutionality has the burden of proof. *Newton v. State*, 824 P.2d 391, 396 (Okl.Cr.1991); *State v. Hunter*, 787 P.2d 864, 865 (Okl.Cr.1990); *Nunley v. State*, 660 P.2d 1052, 1056 (Okl.Cr.1983), *cert. denied*, 464 U.S. 867, 104 S.Ct. 205, 78 L.Ed.2d 179 (1983).

The statutory reference to "competency" covers two requirements: a defendant must have sufficient ability to consult with an attorney; and the defendant must be able to understand the nature of the charges and proceedings being brought against him. 22 O.S.1981, § 1175.1. The question of a defendant's competency can be raised by the defendant, his attorney, the prosecutor or even the court; however, it must state facts "sufficient to raise a doubt" in the court's mind of the defendant's competency. Any such application and sufficient notice must be provided the defendant and must contain certain facts and rights. 22 O.S.Supp.1983, § 1175.2. Once such an application is filed, the court must hold a hearing to examine the application. The court may also entertain other evidence pertinent to the question at that hearing. A court finding merit to the application must order an examination by doctors or appropriate technicians, who shall examine the defendant and determine if he can appreciate the nature of the charges; if he is capable of assisting his attorney; and other questions concerning the attainment of competency (if incompetent), whether the defendant is mentally ill, and whether he poses a threat to himself or others if released without treatment. 22 O.S.Supp.1990, § 1175.3. Following an initial determination by doctors or technicians and upon application, the court is required to hold a hearing on the competency issue. At that hearing, the defendant is presumed competent, and must prove by clear and convincing evidence he is incompetent. 22 O.S.Supp.1985, § 1175.4.

Medina v. California, 505 U.S. ——, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) is dispositive of Appellant's argument he cannot be presumed competent. *Id.* at ——, 112 S.Ct. at 2575, 120 L.Ed.2d at 363 ("Based on our review of the historical treatment of the burden of proof in competency proceedings, the operation of the challenged rule, and our precedents, we cannot say that the allocation of the burden of proof to a criminal defendant to prove incompetence 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (quoting *Patterson v. New York*, 432 U.S. 197, 202, 97 S.Ct. 2319, 2322, 53 L.Ed.2d 281 (1977)).

In *Medina*, the criminal defendant bore the burden of proving his incompetency by a preponderance of the evidence. Oklahoma law requires he prove his incompetency by clear and convincing evidence. To determine whether this offends notions of Due Process requires some discussion of allocation of proof and fundamental concepts of Due Process.

[3] Exactly what "due process" is has never been satisfactorily defined. This Court has stated it is "older than written Constitutions," and the phrase "is synonymous with 'law of the land' as found in Magna Carta." It then concluded the phrase "intended the general law which reads before it condemns, which proceeds upon inquiry and renders judgment only after trial. It means that every citizen shall hold his life, liberty, and property under the protection of the general rules which govern society." *Ex Parte Hollins*, 54 Okl.Cr. 70, 75, 14 P.2d 243 (1932); *see also Dartmouth College v. Woodward*, 4 Wheat. 519, 4 L.Ed. 629, 645 (1819) (same). This Court has also defined it as a provision intended "to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with, or suspected of, crime by those holding positions of favor and authority." *Lyons v. State*, 77 Okl.Cr. 197, 232, 138 P.2d 142 (1943), *aff'd*, 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481 (1944), *overruled on other grounds, Hopper v. State*, 736 P.2d 538, 540 (Okl.Cr.1987). The law is "due process" when it operates on all alike during the regular course of its administration through the courts, and does not subject one to the arbitrary exercise of the powers of government. *Shaw v. State*, 76 Okl.Cr. 271, 134 P.2d 999 (1943) (syllabus); *see also Ward v. State*, 444 P.2d 255 (Okl.Cr.1968), *cert. denied*, 393 U.S. 1040, 89 S.Ct. 665, 21 L.Ed.2d 588 (1969) (Requirements of due process are met if a criminal trial is held according to a settled course of judicial proceedings).

Perhaps the best exposition on the characteristics of due process occurred in an 1878 New York case, where the writer said:

> It is difficult to define with precision the exact meaning and scope of the phrase "due process of law." Any definition which could be given, would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by Mr. Justice Miller of the United States Supreme Court, to leave the meaning to be evolved "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." (*Davidson v. Board of Administrators of New Orleans*, 17 Albany Law Journal, 223) It may however be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen

has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard, is absolutely essential. We cannot conceive of due process without this. In his argument in the *Dartmouth College case* (4 Wheat., 519, 4 L.Ed. 629), Webster defined "due process of law" as a proceeding "which proceeds upon inquiry and renders judgment only after trial." Mr. Justice Edwards in *Westervelt v. Gregg* (12 N.Y. 209) defines it as follows: "Due process of law undoubtedly means in due course of legal proceedings according to those rules and forms which have been established for the protection of private rights."....; and if found to be suitable or admissible in a special case it will be adjudged to be "due process of law;" but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law. *Stuart v. Palmer*, 74 N.Y. 183, 191, 194 (1878); *See also Brown v. Board of Levee Com'rs*, 50 Miss. 468, 478–79 (1874) (whether written "*per legale judicium pariu, suorum, rel per legem terrae*" as found in the Magna Carta; "by the law of the land, or the judgment of his peers"; "due process of law"; "due course of law"; or "according to the law of the land," all have the same general interpretation); *Westervelt v. Gregg*, 12 N.Y. 202, 209 (1854).

However, the term also denotes more than simply the law of the land or the law as it was at the time the constitution took effect:

> .... For that would seem to deny to the legislature the power to alter, change or amend the law. Yet we know that it is every day's practice for the law-making department of the government to repeal old laws, enact new, and change remedies.
>
> The principle does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue.
>
> It refers to certain fundamental rights which that system of justice, of which ours is a derivative, has always recognized. If any of these are disregarded, in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by "due course of law."

Brown, 50 Miss. at 479.

One thing is clear: whatever Due Process is, it is not a wide-open, catch-all provision to be used by every defendant who loses a pretrial motion or by any appellate court that may not agree with the trial court results. As the Supreme Court has observed: "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate 'fundamental fairness' very narrowly." *Medina*, 505 U.S. at ——, 112 S.Ct. at 2576, 120 L.Ed.2d at 362 (quoting *Dowling v. United States*, 493 U.S. 342, 352, 110 S.Ct. 668, 674, 107 L.Ed.2d 708 (1990)). Indeed, as the *Medina* Court continued:

> The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order. As we said in *Spencer v. Texas*, 385 U.S. 554, 564, 87 S.Ct. 648, 653, 17 L.Ed.2d 606 (1967), "it has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." Accord, *Estelle v. McGuire*, 502 U.S. 62, ——, 112 S.Ct. 475, 481, 116 L.Ed.2d 385 (1991); *Marshall v. Lonberger*, 459 U.S. 422, 438, n. 6, 103 S.Ct. 843, 853, n. 6, 74 L.Ed.2d 646 (1983).

Medina, 505 U.S. at ——, 112 S.Ct. at 2576, 120 L.Ed.2d at 362.

[4] From this, we can gather that, however due process is defined, it is satisfied if a defendant has notice[2] and a right to be heard at a public proceeding at which all constitutional and statutory provisions are observed according to those rules and forms which have been established for the protection of private rights, in such a way that it

2. Appellant does not raise a lack of notice in connection with any of these proceedings; accordingly, we do not discuss this requirement of Due Process.

operates on all alike. With those principles in mind, we now turn to the standard of proof a criminal defendant in Oklahoma must bear to prove his incompetence.

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (quoting *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring)). The *Addington* Court further observed the standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

It seems clear the "preponderance-of-the-evidence" standard is generally used in civil proceedings, *e.g.*, matters involving monetary disputes, etc., because society has a minimal concern with the outcome of such private suits. It therefore makes sense that litigants "share the risk of error in roughly equal fashion." *Id.*

But in criminal cases, the interests of the defendant are of such magnitude that they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In other words, "[i]n the administration of criminal justice, our society imposes almost the entire risk of error upon itself, by requiring the State to prove the guilt of an accused beyond a reasonable doubt." *Id.*, 441 U.S. at 423–24, 99 S.Ct. at 1807.

At issue here is the intermediate standard, which our Legislature has termed "clear and convincing." In using this standard our Legislature has determined the interests at stake in this area are more substantial than other civil proceedings (which a competency hearing has been determined to be, *see Miller v. State*, 751 P.2d 733, 737–38 (Okl.Cr.1988)).

The standard of proof used "is more than an empty semantic exercise." *Addington*, 441 U.S. at 425, 99 S.Ct. at 1809 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir.1971) (Sobeloff, J., concurring in part and dissenting in part), *cert. dismissed sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355, 92 S.Ct. 2091, 32 L.Ed.2d 791 (1972)). By placing a certain standard on a certain party, it gives courts an indication of "the value society places on individual liberty." *Id.*

This Court, in considering what standard should govern in a present competency proceeding, must assess the presumption of competency together with the extent of the defendant's interest in not being tried while incompetent and the State's interest in being assured a defendant is not merely attempting to escape prosecution by feigning incompetence in a field where "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations." *Medina*, 505 U.S. at ——, 112 S.Ct. at 2580, 120 L.Ed.2d at 367; *Addington*, 441 U.S. at 430, 99 S.Ct. at 1811–12.

Appellant's case is an excellent example of why our Legislature set the standard of proof so high. His attorneys first informed the trial court they were concerned about his competency because he refused to communicate with them, seeing them as evil forces seeking his death. However, even his own experts admitted the possibility Appellant was malingering. The State's expert, relying on inconsistent answers given to various health care personnel at Eastern State Hospital, Appellant's record, and observations of Appellant himself, concluded Appellant was competent. In the second hearing, held just before trial started, evidence indicated Appellant acted normally in other criminal proceedings and in situations which did not involve the murders. Even his own psychologist admitted one health care professional at Eastern State had labeled him a "world-class, first-class manipulator"; and was of the opinion Appellant both had an affective disorder and was malingering (although he was of the opinion it was the affective disorder, and not the malingering, which prevented Appellant from communicating with his attorneys).

We list these facts here not to determine at this juncture whether Appellant was in fact mentally ill, whether he was malinger-

ing, or both; but to illustrate the inexactness and uncertainty attached to proceedings of this nature, proceedings based on diagnoses which are "to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician." *Medina*, 505 U.S. at ——, 112 S.Ct. at 2580, 120 L.Ed.2d at 367 (quoting *Addington*, 441 U.S. at 430, 99 S.Ct. at 1811–12). The State has great interest in assuring its citizens a thorough and speedy judicial process, together with the presumption of competency which is historically based on our law. A truly incompetent criminal defendant, through his attorneys and experts, can prove incompetency with relative ease. Therefore, we find forcing a criminal defendant to prove by clear and convincing evidence he is incompetent is not subject to proscription under the Due Process Clause, because it does not "offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 505 U.S. at ——, 112 S.Ct. at 2577, 120 L.Ed.2d at 363 (quoting *Patterson*, 432 U.S. at 202, 97 S.Ct. at 2322–23).

We therefore reject Appellant's first proposition of error.

B.

We now turn to Appellant's third proposition, whether Appellant presented sufficient evidence to show he was incompetent.

Appellant had two competency hearings: one in late December 1990 and early January 1991; and the second at the start of his trial, May 1992. Appellant now complains both rulings were incorrect.

[5] This Court has held there are two questions which must be addressed in determining present competency. First, we look at whether the defendant was able to understand the nature of the charges and proceedings brought against him; and second, whether the defendant had the ability effectively and rationally to assist in his defense. *Smith v. State*, 819 P.2d 270, 273–74 (Okl.Cr. 1991), *cert. denied*, — U.S. ——, 112 S.Ct. 2312, 119 L.Ed.2d 232 (1992). As we discussed above, a defendant is presumed competent, and must prove otherwise by clear and convincing evidence. 22 O.S.Supp.1985, § 1175.4.

[6] The first hearing presents no real problem. At that hearing, Dr. Edith King testified Appellant was clearly incompetent before he was sent to Vinita. She gave as examples Appellant seemed very vague concerning his charge and became agitated when asked about the murder charge; he had difficulty focusing on any subject for very long; he did not appear to know what would happen to him if he were convicted, saying he would probably get to go home. Dr. King opined Appellant displayed a thought disorder, with possible auditory and visual hallucinations. However, she thought he could be treated. She admitted the possibility Appellant was malingering, and testified that he seemed more in touch with reality the day of the hearing. However, she could not say he was competent the day of the hearing. On the other hand, Dr. Jeanne Russell testified she conducted the screening interview with Appellant when he entered Eastern State Hospital. At that time, he denied knowing the charges against him, his birthdate, or what his attorney's role was. She also reviewed his hospital record, talked with the staff, and contacted the Department of Corrections concerning previous mental history. She also observed him herself. She did not think Appellant's answers were consistent with answers given other staff members, who recorded some of his statements in his record. In those records, there were at least four occasions recorded where he expressed an understanding of courtroom procedure, knew what the charges against him were, and was aware of the consequences of a conviction. The records also showed Appellant expressed an interest in a plea of not guilty by reason of insanity, indicating he had some knowledge of a possible defense. On one occasion, Appellant was reported to have said: "[y]ou're wasting your time going over courtroom proceedings with me. I know them. I've already spent 10 calendar years behind bars." On another occasion, a notation stated Appellant "won't discuss charges with staff. No reservations in talking with peers," and reportedly said "I've got nothing to lose, I've already got two murder raps on me."[3]

Based on this evidence, we do not find error in the trial court's ruling Appellant was competent.

[7] At the second post-examination competency hearing,[4] Appellant's evidence was stronger. Defense counsel presented inmates from Appellant's jail pod who testified as to Appellant's strange behavior: he compulsively and continually cleaned his cell; played with his feces, smearing it on his face; and talked to himself or to thin air. Dr. Philip Murphy agreed with the comment of a nurse at Eastern State who labeled Appellant a "world-class, first-class manipulator"; however, the psychologist also testified Appellant suffered from major affective (i.e., mood) disorder, which was a form of mental illness. The disorder was episodic in form, meaning it would wax and wane on its own, which made treatment difficult; however, it was treatable. And although Appellant was a malingerer, it was the mental illness which kept him from communicating with his counsel. Therefore, Appellant was not competent.

The prosecution's evidence consisted of various jailers who had worked in the jail pod in which Appellant was housed. None of them had noticed anything strange about Appellant, such as compulsive cleaning of his cell, smearing feces on his face or talking while no one else was there. They testified Appellant communicates normally with other inmates and seemed to be aware of his surroundings. The prosecution also presented evidence Appellant had filed two *pro se* civil rights complaints in federal court, one in October 1991 and one in January 1992. When responses were served on him in jail, he appeared to read the responses and understand their contents.

[8] The court was not required to give controlling effect to the opinion of the expert, and instead found in accord with the State's lay witnesses. This is permissible. *Moore v. State*, 672 P.2d 1175, 1177 (Okl.Cr.1983). As we said in *Siah v. State*, 837 P.2d 485, 487 (Okl.Cr.1992), "this Court has never imposed a static analysis for the lower court to apply in all post-examination competency hearings, and we decline to do so now." Examining the entire record of the proceedings before us, *Fox v. State*, 524 P.2d 60, 65 (Okl.Cr.1974) we hold the trial judge did not abuse his discretion in finding Appellant had not met his burden of proving incompetency.

This proposition is without merit.[5]

3. Appellant argues on appeal Dr. Russell was not a credible witness, as she was not on Appellant's psychiatric team at Eastern State and had never had any significant personal contact with him. We find this unpersuasive. *See Johnson v. State*, 761 P.2d 484, 492 (Okl.Cr.1988) (psychiatrists who were responsible for evaluating Appellant almost five years earlier were dead at time case remanded for post-evaluation competency hearing; however, medical records were still intact and a doctor on staff at Eastern State Hospital testified regarding the information in appellant's record. Court did not question ability of later doctor to make analysis based on records alone.)

4. At trial, Appellant's attorneys argued to the court the hearing held right before trial was not the post-examination competency hearing, but rather the first hearing, at which the court must have a "doubt" as to a defendant's competency before he can order an evaluation. *See* sections 1175.2 and 1175.3 of Title 22. Trial attorneys also argued that because the hearing was the pre-evaluation hearing, the trial court used the wrong standard in determining there was no merit to Appellant's claim. However, on appeal, Appellant seems to have abandoned that argument, instead referring to both the earlier hearing and the hearing immediately before jury selection as "post-examination competency hearings." Appellant's brief-in-chief at 13; *see also* brief at 15. We therefore need not address the question presented at the trial level concerning which hearing was actually held before trial.

5. We feel compelled to address an extremely lamentable comment by the trial judge, if only to show no error occurred other than a slip of the tongue. At the same hearing during which defense counsel expressed his opinion Appellant was faking incompetency (but was not positive that was the case), the court agreed the issue could rise again. In response to counsel's cautionary observation Appellant may not be faking and could damage his chances if he acted up in front of the jury, the court stated: "It's a travesty, perhaps. We're talking about two things. Insanity as a defense to a crime or incompetence to assist counsel. So, if an incompetent person is convicted of a crime that he committed when he was sane, I don't see any harm's done." However, this Court does not look at the record in isolation. During the second competency hearing, the trial court exhibited an overabundance of caution in protecting Appellant's rights

C.

[9] For his fourth proposition, Appellant alleges the court erred in accepting trial counsel's waiver of his right to have a jury determine competency. On both occasions, the court specifically asked defense counsel if they wanted a jury trial on the issue of competency; on each occasion, they expressly waived it. Defendant acknowledges that; however, he complains they did not consult him before waiving the right, as he claims they must do.

The applicable statute reads in pertinent part:

> B. The court, at the hearing on the application, shall determine, by clear and convincing evidence, if the person is incompetent. .... If the court deems it necessary, or if the person alleged to be a person requiring treatment, or any relative, friend, or any person with whom he may reside, or at whose house he may be, *shall so demand*, the court shall schedule the hearing on the application as a jury trial to be held within seventy-two (72) hours of the request,....

22 O.S.Supp.1985, § 1175.4 (emphasis added). This Court has interpreted that provision to mean a defendant is entitled to a jury trial on the issue of competency only if he demands it. *Scott v. State*, 730 P.2d 7 (Okl.Cr.1986).

Appellant's cases are inapplicable. *Beck v. State*, 626 P.2d 327, 328 (Okl.Cr.1981), concerns itself with section 1162 of Title 22, dealing with sanity, not competency. *Hayes v. State*, 541 P.2d 210, 212 (Okl.Cr.1975) deals with a valid waiver of trial by jury.

Here, Appellant was not speaking to his attorneys. Under the circumstances, they did the best they could, calculating the bench would be kinder to them than a jury would. This proposition is without merit.

III. JURY SELECTION ISSUES

A.

[10] Appellant in his seventh proposition of error complains the prosecutor defined "reasonable doubt" for the jury during voir dire. The record shows during voir dire, the prosecutor asked one prospective juror: "And you can't define it, like we've said, but without telling me what it is, do you think you can come to a conclusion about what that means, what reasonable doubt is, what's reasonable, what's a doubt, all that?"

We find no error, as we find this question did not attempt to define reasonable doubt. *Cf. Diaz v. State*, 728 P.2d 503, 511 (Okl.Cr. 1986) (Comment by prosecutor "You have heard all this talk about beyond a reasonable doubt and you heard the Court ... saying that that is not the same thing as beyond a shadow of a doubt." Did not constitute the prosecutor's "defining" the phrase, nor did the remark create an erroneous impression.); *Wald v. State*, 513 P.2d 330, 333 (Okl.Cr. 1973) (Question by prosecutor "... does the term 'reasonable doubt' to you in your mind connote to you beyond all doubt whatsoever? In other words the law implies or gives the State of Oklahoma the burden of proving a person charged with a crime the burden of proving that person guilty beyond a reasonable doubt, but I'm sure all of you have heard the term beyond a shadow of a doubt or beyond all doubt, and what I am asking you, would you hold the State of Oklahoma to a greater degree of proof than the law imposes?" Held, no attempt made by the prosecutor to define the term of reasonable doubt).

Accordingly, this assignment of error is without merit.

B.

In his eighth proposition of error, Appellant contends the trial court improperly excused for cause two panel members based on their answers to questions about the death penalty.

[11] The first juror to which Appellant objects is Florence Fields. She first said she could consider the death penalty in a proper case. She related she had a cousin whose body was found three days after she was abducted and murdered; she had another relative to whom she was not very close who had been stabbed to death by a boyfriend. The abduction and murder occurred approximately five or six months before this trial; the stabbing occurred three or four years before. During questioning by the prosecutor, Ms. Fields then said she did not believe in the death penalty "under no circumstances." Consequently, when asked if she could sentence someone to death, she said she could "not really" do that. At that point, the court stepped back in, reminded her she had said she could do so. When asked to explain her answers, she said "Well, if you consider it all the way around, then I wouldn't. I could consider it, but just to say I would put somebody to death, no." The court, in an attempt to interpret her answer, asked "[y]ou could consider it, but you couldn't put them to death. Is that what you're saying?" to which Ms. Fields responded "yes." Then in response to questioning by defense counsel, she said there were no circumstances where she could give the death penalty. She then said there might be circumstances where the death penalty was deserved, but "I don't know if I could really do that." She said she would keep an open mind. However, when again asked by the prosecutor, she said she would not ever give the death penalty. At that point, the court excused her for cause.

The Supreme Court in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), dispensed with earlier language in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) by holding a party need not prove a juror's bias against the death penalty with "unmistakable clarity," observing this was because "determination of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Wainwright*, 469 U.S. at 424, 105 S.Ct. at 852.

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror.

Id., 469 U.S. at 424–26, 852–53. We have followed that philosophy. *See, e.g., Robedeaux v. State*, 866 P.2d 417, 424 (Okl.Cr. 1993); *Banks v. State*, 701 P.2d 418, 421–422 (Okl.Cr.1985), *cert. denied*, 502 U.S. 1036, 112 S.Ct. 883, 116 L.Ed.2d 787 (1992).

[12] The same thing is true concerning Verna Kolar. She told the court the district attorney's office had prosecuted her brother in a case a few years before; however, she also said her brother admitted the accusations and pled guilty, so she held no grudges. She first said she could base the punishment on the crime and surrounding facts.[6] She then said she could "probably" agree on a verdict imposing death, "but I do not know if I could sleep well that night doing so." The court then observed:

> Well, it's very difficult sometimes for people to sleep for anything, you know. This is one of those times you just have to do what you think is right. You say you probably could. Now we're talking about where the law and the evidence warrant, could you agree on a verdict imposing the death penalty. I'm not trying to make you say one or the other; I'm just asking what you think?
>
> PROSPECTIVE JUROR KOLAR: No, no I could not.
>
> THE COURT: If you found beyond a reasonable doubt that the Defendant was guilty of Murder in the First Degree, and if, understand the evidence, the facts and circumstances of the case, the law would permit you to consider a sentence of death,

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See 5–4 Tr. 31–38, 260–272; 1 Trial Tr. 3–8. In other words, although the court may have made an injudicious comment, his judicious actions belied his words.

6. When asked if she had any feelings that would prevent or impair her from considering the death penalty, she replied: "I want to say, yes, I do and, no, I don't. There have been instances when I could answer that easily and say, yes, that person is guilty, that person deserves to die. And there have been other instances when I could not say that."

are your reservations about the death penalty such that, regardless of law, the fact and circumstances of the case, you would not inflict the death penalty?

PROSPECTIVE JUROR KOLAR: No sir, I would not.

During questioning by defense counsel, Ms. Kolar said she had said in the past one person or another deserved to die, but "that's because I was out there and I could say those things, because I had no effect whatsoever on that person's life, and here, I do. I cannot easily say that about another human being." On further questioning, Ms. Kolar admitted she could "sit here and say I can [impose the death penalty under the proper circumstances], but there's a lot of difference in sitting right here, even, and walking out that door and doing it. I have no idea what I will do there." The court gave Ms. Kolar the night to consider her position, then excused her the next morning without further questioning. Defense counsel did not object.

The same analysis applies to Ms. Kolar as to Ms. Fields. *Wainwright, supra; Robedeaux, supra, Banks, supra.*

This proposition is without merit.

C.

[13] Appellant then complains his constitutional rights were violated by the use of "death qualification" voir dire questions.

We have repeatedly considered this argument, and have repeatedly rejected it. *Boltz v. State*, 806 P.2d 1117, 1123 (Okl.Cr.1991), *cert. denied*, 502 U.S. 846, 112 S.Ct. 143, 116 L.Ed.2d 109 (1991); *Moore v. State*, 761 P.2d 866, 877 (Okl.Cr.1988); *Johns v. State*, 742 P.2d 1142, 1148 (Okl.Cr.1987); *Banks v. State*, 728 P.2d 497, 502 (Okl.Cr.1986); *Hager v. State*, 665 P.2d 319, 322 (Okl.Cr.1983). We do so yet once again. Appellant's ninth proposition of error is without merit.

IV. FIRST-STAGE TRIAL ISSUES

A.

[14] For his fifth proposition, Appellant claims his case must be reversed because the court gave the jury the standard flight instruction, OUJI–CR 806.[7] Appellant did not testify at trial, nor did he offer any explanation for his conduct.

Appellant points out this Court in *Mitchell v. State*, 876 P.2d 682 (Okl.Cr.1994), declared improper a court's giving the flight instruction in cases where the defendant did not explain his departure. The Court reasoned that giving the instructions in a situation such as this one violated a defendant's presumption of innocence, *see* 22 O.S.1981, § 836,[8] as it "assum[ed] the defendant [has] committed the crime." *Mitchell*, 876 P.2d at 684.

7. It appears the instruction was based on the evidence Appellant ran when first confronted by police, rather than on evidence Appellant left the scene of the murder, although the record could have been clearer on this point. Appellant's counsel admitted as much during oral argument, pointing out the only reference by the prosecutor to flight during his closing argument was in connection with Appellant's attempts to run from police when spotted several days after the murder.

8. That section, in effect and unchanged since our laws were adopted from the Dakota Laws of 1887, reads: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted." In supplemental authority, Appellant has provided us with United States Supreme court cases containing dicta which indicate the presumption of innocence is "axiomatic and elementary." *See e.g., In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). We recognize the possibility the presumption of innocence may be so ingrained in our system of justice as to assume Fourteenth Amendment Due Process proportions. However, the law upon which our statutory presumption of innocence is based predates even *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481, 491 (1895), the basis for all subsequent Supreme Court pronouncements on the subject. Indeed, it is this statutory presumption, and not any ephemeral Due Process concerns, which provided the basis for *Vuletich v. State*, 735 P.2d 568 (Okl.Cr.1987), quoted by *Mitchell* as authority for the infirmity in language from OUJI–CR 806. It was in *Vuletich* where we said: "[i]t is improper to tell a jury they must determine guilt or innocence. It is the jury's duty to determine whether the State has demonstrated guilt beyond a reasonable doubt..... If the State fails to sustain its burden, the jury must find the defendant not guilty. See 22 O.S.1981, § 836. A determination of innocence is not required." *Id.* at 569.

The State acknowledges *Mitchell*, but argues it should be applied prospectively only, since it constituted a "clear break from prior law." State's brief at 25.[9] Appellant in his reply brief cited *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), which held that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past. We must therefore determine whether *Griffith* is applicable in this case. We hold it is not.

Griffith and the retroactivity principle is indeed applicable in all questions concerning federal questions. However, the Supreme Court has never held we must apply the same standard to holdings by this Court dealing with issues of state law. To the contrary, the Court has explicitly stated that when questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. *See Harper v. Virginia Dept. of Taxation*, 509 U.S. ——, ——, 113 S.Ct. 2510, 2519, 125 L.Ed.2d 74, 88 (1993); *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 178, 110 S.Ct. 2323, 2330–31, 110 L.Ed.2d 148 (1990); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932); *see also Lackey v. Scott*, 28 F.3d 486, 491 (5th Cir.1994) (Texas Court of Criminal Appeals decision requiring definition of reasonable doubt not governed by *Griffith*, as "Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so"; citing to *American Trucking*); *McSherry v. Block*, 880 F.2d 1049, 1052–53 & n. 2 (9th Cir.1989), *cert. denied*, 499 U.S. 943, 111 S.Ct. 1404, 113 L.Ed.2d 459 (1991); *Diggs v. Owens*, 833 F.2d 439, 442 (3d Cir.1987) (holding *Griffith* applied to constitutional rules of criminal procedure; does not require retroactive application of "new procedural decisions not constitutionally grounded"); *Royster v. Fauver*, 775 F.2d 527, 529 (3d Cir. 1985); *Galloway v. Beto*, 421 F.2d 284, 289 (5th Cir.1970), *cert. denied*, 400 U.S. 912, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970) (court not bound by Texas court's pronouncement on double jeopardy, but is bound by Texas court's holding on the relationship of two offenses as it affects an implied acquittal doctrine).

This Court has heretofore made pronouncements which it declared would be applied prospectively only. *See e.g., Perez v. State*, 798 P.2d 639, 640 (Okl.Cr.1990); *State v. Neal*, 604 P.2d 145, 147 (Okl.Cr.1979); *Walton v. State*, 565 P.2d 716, 718 (Okl.Cr. 1977). Appellant, however, responds those rulings were based on federal caselaw which was overruled by *Griffith*.

We recognize this, but find it has no bearing on our analysis. A state court is empowered to use federal law in analyzing questions of state law. We are free to use these federal cases as persuasive authority for the purpose of guidance; however they do not themselves compel the result we have reached. *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476–77, 77 L.Ed.2d 1201 (1983). We have done so before, and do so here. *See also Rivers v. State*, 889 P.2d 288, 291 (Okl.Cr.1994).

The basic principles of retroactivity in criminal cases before *Griffith* were established in *Linkletter v. Walker*, 381 U.S. 618, 636, 85 S.Ct. 1731, 1741, 14 L.Ed.2d 601 (1965); *Tehan v. Shott*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966), and *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). In summing up those

9. At oral argument, the State proposed *Mitchell* should be applied to all cases after Appellant's Mitchell himself. We find no authority for that. In cases such as *Fite v. State*, 873 P.2d 293 (Okl.Cr.1993), we declined to apply our ruling to the appellant before us, as to do so would create an "ex post facto"/Due Process violation arising from the new ruling itself. In other situations, the ruling announced also applied to the appellant in that particular case, if it was not a profound break from prior caselaw. *See e.g., People v. Ward*, 206 Mich.App. 38, 520 N.W.2d 363, 366 (1994) (case holding defendant waives complaint of disproportionate sentence by pleading guilty pursuant to a plea bargain applied retroactively to case *sub judice*; result was clearly foreshadowed by other cases). We find no cases—and the State provides none—in which the appellate court made a pronouncement in an appellant's favor, but did not apply that favorable ruling to the appellant before them, who advanced the argument.

cases, the Court in *Stovall v. Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967), said:

> "[t]he criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Stovall, 388 U.S. at 297, 87 S.Ct. at 1970. *See also Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984). This is the standard this Court has used previously. *See Edwards v. State*, 591 P.2d 313, 317 (Okl.Cr.1979); *Rutledge v. State*, 527 P.2d 1373, 1375 (Okl.Cr.1974); *Poke v. State*, 515 P.2d 252, 254 (Okl.Cr.1973); *Garrett v. State*, 438 P.2d 945, 948 (Okl.Cr.1968) (ruling correcting deficient instruction to be applied prospectively only). We find these criteria still valid in interpreting our state law questions. *See Griffith*, 479 U.S. at 329–34, 107 S.Ct. at 716–19 (White, J., with whom Rehnquist, C.J. and O'Connor, J., join, dissenting).[10]

Having established the criteria this Court uses to determine whether a holding of state law should be retroactive, we now turn to the case *sub judice*.

Concerning (b) the extent of the reliance by law enforcement authorities on the old standards, there can be little debate OUJI-CR 806 "would have been given in the proper situation by every court in this jurisdiction based on caselaw that existed before *Mitchell*." *Rivers*, 889 P.2d at 292. The *Mitchell* Court itself noted use of the instruction had caused "confusion" in the past. *Id.*, 876 P.2d at 685. And this Court has approved of its use in prior cases similar to Appellant's, regardless of whether an explanation was given. *See Id.*, 876 P.2d at 686–87 (Lumpkin, P.J., which whom Lane, J., joins, dissenting), and cases cited therein.

Concerning (c) the effect on the administration of justice of a retroactive application of the new standards and (a) the purpose to be served by the new standards, requiring only a prospective application places Appellant "in the same situation as those on post-conviction, eliminating the inherent inequality that results between appellants whose appeals are separated only by time." *Rivers*, 889 P.2d at 292. It also eliminates the inherent unfairness which a clear break with prior existing caselaw can place on the court below, who gave the instruction in good faith. *Id.*

We therefore hold *Mitchell* does not automatically apply retroactively, *see Rivers*, 889 P.2d at 292, and it does not apply in this case.

[15] There is another, equally compelling, reason *Mitchell* does not apply here. This Court in *Mitchell* made it clear whether reversible error occurred would be determined by the particular facts of each case. *See Id.*, 876 P.2d at 685 ("*Based on the facts in this case*, it was reversible error to give instructions on flight" (emphasis added)). This fact-specific dictate is also reflected in *Kentucky v. Whorton*, 441 U.S. 786, 788–89, 99 S.Ct. 2088, 2089–90, 60 L.Ed.2d 640 (1979). There, a state district court failed to give an instruction on the presumption of innocence. The Kentucky Supreme Court reversed, feeling such an instruction was mandated by *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). The United States Supreme Court disagreed, stating the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution. Rather, "such a failure must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial." *Whorton*, 441 U.S. at 789, 99 S.Ct. at 2090. *See also Hyatt v. State*, 779 P.2d 993, 995 (Okl.Cr.1989) (following *Whorton*).

The facts of this case do not require reversal. As noted above, it seems clear the flight instruction was given here not based on Appellant's flight from the *crime*, but from his flight from *police* several days after the crime. The evidence showed when Appellant was apprehended after the chase, he was carrying a device commonly used to smoke crack cocaine. He was arrested for possession of drug paraphernalia based on this charge.

Therefore, *Mitchell* is not applicable here, as it does not "assume the defendant to have committed the crime" for which he was on trial. *Mitchell*, 876 P.2d at 684. If anything, the instruction was improperly given, not because of flight to avoid arrest on a murder charge, but because it would tend to show he committed the crime of possession of drug paraphernalia, a crime with which he was not charged. *See Compton v. State*, 74 Okl.Cr. 48, 53, 122 P.2d 819, 821 (1942) (flight signifies not merely leaving, but leaving under a consciousness of guilt and for the purpose of evading arrest). Accordingly, we find any error in giving the flight instruction was harmless, as the misdirection of the jury has not "resulted in a miscarriage of justice," or has not constituted "a substantial violation of a constitutional or statutory right." 20 O.S. 1991, § 3001.1.

Consequently, we find Appellant's fifth proposition to be without merit.

B.

[16] At trial, Appellant's attorneys submitted the following handwritten instruction defining reasonable doubt.

> "You are instructed that the term proof beyond a reasonable doubt means evidence which creates a moral certainty as to the guilt of the defendant. If the evidence does not amount to a moral certainty in your mind you must find the defendant not guilty."

10. We are not the only state to hold in this fashion. *See People v. Carrera*, 49 Cal.3d 291, 261 Cal.Rptr. 348, 369–71, 777 P.2d 121, 142–43 (1989); *People v. Robinson*, 229 Cal.App.3d 1620, 281 Cal.Rptr. 26, 29 (1991) (defendant convicted, then escaped. In interim, appellate court hands down ruling which would have been favorable to appellant had his appeal been decided earlier. Court refuses to apply retroactively, as to do so would be "inherently offensive to the judicial process."); *Fenelon v. State*, 594 So.2d 292, 295 (Fla.1992) (case banning flight instruction given prospective application only; harmless error analysis conducted); *Green v. State*, 641 So.2d 391, 395 (Fla.1994) (stressing prospectivity); *Taylor v. State*, 630 So.2d 1038, 1042 (Fla.1993), *cert. denied*, — U.S. —, 115 S.Ct. 107, 130 L.Ed.2d 54 (1994) (same); *Gray v. State*, 640 So.2d 186, 193–94 (Fla.App.1994) (notes state supreme court moved away from prior caselaw, which would have held *Fenelon* applied retrospectively; cases cited); *Gilliam v. State*, 582 So.2d 610, 612 (Fla.1991) (caselaw requiring sentencing judge in capital case to expressly evaluate in written order each mitigating circumstance to determine whether it is supported by evidence applied prospectively only; prior holdings not fundamental changes, but rather "evolutionary refinements"); *State v. Singletary*, 549 So.2d 996, 999 (Fla.1989) (decision requiring judge to be present during voir dire questioning by attorneys to be applied prospectively only) *Catlett v. State*, 627 So.2d 558, 559 (Fla.App. 1993) (recognizing prospective application of *Singletary*; *People v. Steidl*, 142 Ill.2d 204, 154 Ill.Dec. 616, 633, 568 N.E.2d 837, 854 (1991), *cert. denied*, 502 U.S. 853, 112 S.Ct. 161, 116 L.Ed.2d 125 (1991) (holding in *People v. Gacho*, 122 Ill.2d 221, 119 Ill.Dec. 287, 522 N.E.2d 1146 (1988), *cert. denied*, 488 U.S. 910, 109 S.Ct. 264, 102 L.Ed.2d 252 (1988) requiring new instruction in multiple murders involving mitigating evidence in capital cases was prospective only; *Griffith* not applicable); *Foster v. State*, 639 So.2d 1263, 1298–99 (Miss.1994) (noting prospective application of decision prohibiting use of two specific aggravating circumstances in capital case under common fact pattern); *People v. Sprowal*, 84 N.Y.2d 113, 615 N.Y.S.2d 328, 331–32, 638 N.Ed.2d 973, 976–77 (1994) (decisions requiring defendant to be present during sidebar conferences between judge and prospective juror to be applied prospectively only, even though absence in some instances could have a "substantial effect" on the ability to defend against the charges); *People v. Garcia*, 161 Misc.2d 1, 612 N.Y.S.2d 552, 555–56 (N.Y.A.D.1994) (recognizing *Griffith*, but using *Linkletter* factors to determine retroactivity of state issue); *Geesa v. State*, 820 S.W.2d 154, 163–65 (Tex.Crim.App. 1991) (holding dealing with definition of reasonable doubt prospective only, as it does not change the standard of proof of reasonable doubt; *Griffith* not applicable); *Barnes v. State*, 876 S.W.2d 316, 328 (Tex.Crim.App.1994), *cert. denied*, — U.S. —, 115 S.Ct. 174, 130 L.Ed.2d 110 (1994) (following *Geesa*); *Labrum v. Utah State Board of Pardons*, 870 P.2d 902, 912 n. 9 (Utah 1993); *Hurn v. State*, 872 P.2d 189, 198–99 (Alaska App.1994) (decision placing duty on trial judge to make record of a defendant's decision not to testify to be applied prospectively; using factors enunciated in *Linkletter* and *Stovall*); *State v. Adams*, 156 Ariz. 88, 750 P.2d 31, 32 (Ariz.Ct.App.1987); *State v. Ottwell*, 852 S.W.2d 370, 372 (Mo.Ct.App.1993) (State supreme court decision holding instruction on intoxication violated Due Process to be applied prospectively, except in cases where complaint was preserved at trial by appropriate objection).

The instruction was refused. For his sixth proposition, Appellant claims the court erred in refusing the instruction.

We disagree. This Court has a long history of holding it is error to give an instruction defining reasonable doubt, whether it is requested by the defendant, *see Grant v. State*, 703 P.2d 943, 946 (Okl.Cr.1985), *Spitznas v. State*, 666 P.2d 1307, 1307–08 (Okl.Cr.1983), *Templer v. State*, 494 P.2d 667, 671–72 (Okl.Cr.1972) *Mott v. State*, 94 Okla.Crim. 145, 156, 232 P.2d 166, 177 (1951); or given by the court, *see Fellows v. State*, 508 P.2d 1089, 1090–91 (Okl.Cr.1973), *Young v. State*, 373 P.2d 273, 277–79 (Okl.Cr.1962), *cert. denied*, 371 U.S. 957, 83 S.Ct. 513, 9 L.Ed.2d 504 (1963); *Brookshire v. State*, 284 P.2d 752, 754–55 (Okl.Cr.1955), *Lippoldt v. State*, 271 P.2d 745, 749 (Okl.Cr.1954), *Wallace v. State*, 96 Okl.Cr. 163, 164–65, 250 P.2d 484, 485–86 (1952). This is so because to give such an instruction tends to confuse the jury.

Specifically, we have addressed the "moral certainty" language requested by appellant's trial counsel. In doing so, we stated:

> Fourthly, the defendant complains of error in trial court by a refusal to allow the defense counsel to use the term 'moral certainty' as synonymous with 'beyond a reasonable doubt'....
>
> The defendant goes on ... to urge that the court committed error in refusing to allow the defendant an instruction on the terms 'moral certainty' and 'beyond a reasonable doubt.' Defendant cites as his only authority ... the case of *Gray v. State*, 56 Okl.Cr. 208, 38 P.2d 967 (1934), wherein the Court held that while the terms 'moral certainty' and 'beyond a reasonable doubt' are synonymous in some dictionaries, the difficulty is that the words 'moral certainty' add nothing to the words 'beyond a reasonable doubt,' as one may require explanation as much as the other. We also observe that *Gray*, supra, as well as a number of more recent cases, holds that it is not necessary for the trial court to define what is meant by a 'reasonable doubt,' and trial courts have been repeatedly admonished against giving any instruction attempting to define the term 'reasonable doubt.'
>
> In more recent years, trial courts have been severely criticized by this Court for attempting to define the term 'reasonable doubt.' See *Bell v. State*, Okl.Cr., 381 P.2d 167 (1963); and, it has even been held reversible error to so define this difficulty-of-definition term. *Wilson v. State*, Okl.Cr., 403 P.2d 262 (1965); *Lee v. State*, Okl.Cr., 430 P.2d 858 (1967).
>
> We reiterate the phrase 'reasonable doubt' is self-explanatory, and definitions thereof do not clarify its meaning, but rather tend to confuse a jury; therefore, instructions defining it are unnecessary, and should not be given. The same logic should apply in attempts in voir dire examinations to explain to the jury what is meant by 'reasonable doubt.'

Templer, 494 P.2d at 671–72. *See also Victor v. Nebraska*, 511 U.S. ——, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).

Accordingly, Appellant's sixth proposition is without merit.

C.

[17] In his tenth proposition, Appellant alleges the court erred in allowing into evidence a color photograph of Mr. Sheppard taken at the scene. The photograph showed the position of the body after it had been rolled off its side. It displayed characteristics of a body which had been left unattended for four days. During the second stage, the prosecution introduced photographs of Mrs. Warner as she was found half-nude in her residence. Other photographs depicted the injury caused by the ramming of the knife-sharpening tool into her neck.

We have carefully reviewed the photographs and do not find them unduly gruesome. As we recently said in *McCormick v. State*, 845 P.2d 896, 898 (Okl.Cr.1993), "[g]ruesome crimes result in gruesome photographs." We find no abuse of the trial court's discretion in admitting the photographs. Accordingly, this proposition is without merit.

V. COMPETENCY OF COUNSEL

Appellant next argues his counsel was incompetent. He bases this allegation on two

grounds. The first is his attorney's sharing his beliefs with the court Appellant was "faking" incompetence. The second portion relates to his incompetence to stand trial; he essentially argues his counsel was incompetent in his representation because Appellant himself was incompetent, and therefore could not communicate with counsel.

[18] The second portion of Appellant's argument hinges on the trial court's determination he was competent. If Appellant was competent and merely malingering, any lack of communication with counsel was solely Appellant's fault; if Appellant were incompetent, this case would be reversed on that basis. Therefore, we will reserve the second portion of Appellant's argument until we reach the threshold matter of Appellant's competency.

[19] Concerning the first portion of the proposition, the record shows counsel filed an application for determination of competency in August 1990. At that time, Appellant was examined by a psychologist who recommended he be sent to Eastern State Hospital at Vinita for examination, which the District Court ordered. Upon completion of his treatment, Appellant was returned to Oklahoma County, where his counsel waived determination by jury. A post-examination competency hearing presented to the bench was held, and at the conclusion of the hearing Appellant was adjudged competent. During that hearing, defense counsel presented the same psychologist who had examined Appellant before he went to Vinita. He claims on appeal counsel was ineffective for failing to get a new psychologist, someone who could base impressions on an interview with Appellant after his return from Vinita instead of relying almost exclusively on data obtained before he left.

We first address the claim counsel was somehow incompetent because he was candid with the court in sharing his belief Appellant was "faking" competency. This did not occur during either the first competency hearing or even during the second one; rather, counsel made his comment at the end of another hearing discussing other motions which occurred after the first competency hearing. Counsel felt the need to make a record on his client's uncooperative and threatening attitude. Counsel also quickly followed up his personal belief with the statement he was not a doctor, and others in his office felt Appellant was incompetent; therefore, he felt obliged to raise the issue again. After the court reminded counsel of the results of the first competency hearing, counsel observed incompetency could happen at any time, then essentially let the matter drop at that time.

However, immediately before the start of jury selection proceedings, the same counsel recanted his earlier statements, telling the court his client was incompetent and requested another hearing.

In short, counsel had not made his statements at the first hearing. After the first hearing and before the second one, counsel as an officer of the court candidly expressed his impressions, as he had a duty to do. *Model Rules of Professional Conduct* Rule 3.3(a)(2),[11] 5 O.S.Supp.1988, Ch. 1, App. 3–A. By the time of trial and the second hearing, counsel recanted his statements. Appellant has cited us no authority—and we know of none—declaring an attorney incompetent as a matter of constitutional law because that attorney may harbor doubts as to his client's sincerity in a criminal proceeding.

[20] Concerning counsel's failure to obtain another expert for the post-examination competency hearing, we find no error. Evaluating the entire record of competency proceedings before us, *Fox v. State*, 524 P.2d 60, 65 (Okl.Cr.1974),[12] selection of another expert

11. That rule reads:
> (a) a lawyer shall not knowingly:
>
> ....
>
> (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid a criminal or fraudulent act by the client.

12. There, we said:
> It is not sufficient for the defense counsel merely to say that he is unable to communicate with his client; and, that his client's mental processes seem to waver while he is discussing the case with him; and, that his client does not understand the seriousness of a charge, to constitute justification for a finding that the defendant is mentally incompetent. In considering this question it is necessary that we consider the entire record.

would not have changed the outcome of the proceedings. The record was virtually brimming with evidence Appellant was malingering (that evidence is discussed in II.B., above).

Absent evidence to the contrary, and examining counsel's performance during both hearings, we cannot declare that Appellant has rebutted the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Cameron v. State*, 829 P.2d 47, 56 (Okl.Cr.1992) (citing *Strickland v. Washington*, 466 U.S. 668, 694–96, 104 S.Ct. 2052, 2068–69, 80 L.Ed.2d 674 (1984); or that but for his conduct, there was a reasonable probability the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* 829 P.2d at 56; *Strickland*, 466 U.S. at 698, 104 S.Ct. at 2070.

In light of the discussion contained in Appellant's third proposition, it follows Appellant's counsel was not incompetent because he could not communicate with Appellant either in preparing for or during trial. As we have previously observed, "[a]lthough appellant was a difficult client to represent, he was not an incompetent one." *Johnson v. State*, 761 P.2d 484, 492 (Okl.Cr.1988). The decision not to communicate with counsel was Appellant's alone; whatever reasons he may have had for not communicating, it was not because he was unable to do so.

VI. SECOND-STAGE TRIAL ISSUES

A.

[21] Appellant next contends the court committed error by failing to instruct the jury it had the option to return a life sentence regardless of its findings of aggravating circumstances.

We have rejected this argument previously. *Williamson v. State*, 812 P.2d 384, 410 (Okl.Cr.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1592, 118 L.Ed.2d 308 (1992). We do so again.

This eleventh proposition is without merit.

B.

[22] Appellant next contends the court erred in failing to instruct the jury it could consider sympathy for the accused in assessing punishment.

We have addressed this issue before and have continually found it to be lacking. *Stout v. State*, 817 P.2d 737, 740 (1991). We do so again.

This twelfth proposition of error is without merit.

C.

[23] Appellant in his thirteenth proposition of error contends the court erred in not instructing the jury its findings concerning mitigating circumstances did not have to be unanimous.

This, too, has been considered and rejected by this Court. *Mayes v. State*, 887 P.2d 1288, (Okl.Cr.1994).

Accordingly, this proposition of error is without merit.

D.

[24] For his fourteenth proposition of error, Appellant asserts the court erred in giving instructions which permitted jurors to ignore mitigating evidence.

We have rejected this argument as well. *Williamson*, 812 P.2d at 409. We do so again.

This proposition is without merit.

E.

[25] In his fifteenth proposition of error Appellant claims the instruction defining "heinous, atrocious or cruel" is unconstitutional because it does not adequately channel the jury's discretion.

We addressed this argument in *Nuckols v. State*, 805 P.2d 672, 674 (Okl.Cr.1991), *cert. denied*, 500 U.S. 960, 111 S.Ct. 2276, 114 L.Ed.2d 727 (1991). We see no need to address it again. *See also Walton v. Arizona*, 497 U.S. 639, 654–55, 110 S.Ct. 3047, 3057–58, 111 L.Ed.2d 511, 529 (1990); *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); *United States v. Pretlow*, 779 F.Supp. 758, 773 (D.N.J. 1991); *United States v. Cooper*, 754 F.Supp. 617, 623 (N.D.Ill.1990); *Nguyen v. State*, 769 P.2d 167, 174 (Okl.Cr.1988), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3264, 106 L.Ed.2d 609 (1989).

We find no merit to this proposition.

F.

[26] For his sixteenth proposition, appellant contends there was insufficient evidence to sustain the aggravating circumstance he killed Mr. Sheppard to avoid arrest or prosecution for burglary.

[27] The existence of this aggravating circumstance is determined by looking at the killer's intent. *Romano v. State*, 847 P.2d 368, 387 (Okl.Cr.1993), *aff'd*, 512 U.S. —, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994); *Williamson v. State*, 812 P.2d 384, 407 (Okl.Cr. 1991), *cert. denied* — U.S. —, 112 S.Ct. 1592, 118 L.Ed.2d 308 (1992); *Stouffer v. State*, 738 P.2d 1349, 1361–1362 (Okl.Cr. 1987), *cert. denied*, — U.S. —, 112 S.Ct. 1573, 118 L.Ed.2d 217 (1992); *Moore v. State*, 736 P.2d 161, 165 (Okl.Cr.1987), *cert. denied*, 502 U.S. 913, 112 S.Ct. 313, 116 L.Ed.2d 255 (1991). In the absence of his own statements of intent, such evidence may be inferred from circumstantial evidence. *Banks v. State*, 701 P.2d 418, 426 (Okl.Cr. 1985), *cert. denied*, 502 U.S. 1036, 112 S.Ct. 883, 116 L.Ed.2d 787 (1992).

Evidence during the second stage indicated Appellant had been convicted of robbing two men whom he had allowed to live. Those men gave a description of Appellant and the vehicle that ultimately allowed Appellant to be captured and imprisoned. This was true even though the victims did not know Appellant. This would tend to show a reluctance to allow another victim to live, even though he did not know the victim. The evidence also showed Appellant pulled down the shades during the burglary of Mr. Sheppard's house and wiped down what was probably the murder weapon. Both these acts tend to show Appellant did not want to be detected or identified by anyone. In the light most favorable to the prosecution, this evidence would tend to show Appellant murdered Mr. Sheppard so he would not be detected or arrested as a result of his burglary. *See Parks v. State*, 651 P.2d 686, 695 (Okl.Cr.1982), *cert. denied*, 459 U.S. 1155, 103 S.Ct. 800, 74 L.Ed.2d 1003.

[28] Appellant also contends this Court has applied the "avoiding arrest" aggravating circumstance, codified at 21 O.S. § 701.12(5),[13] in a standardless, *ad hoc* fashion, rendering it unconstitutionally vague. However, Appellant has not supported his contentions with relevant argument and citations of authority, instead making vague references to other aggravating circumstances he claims are also unconstitutionally vague. Therefore, we will not address it. *Munson v. State*, 758 P.2d 324, 335 (Okl.Cr.1988), *cert. denied*, 488 U.S. 1019, 109 S.Ct. 820, 102 L.Ed.2d 809. We note in passing the Oklahoma death penalty statutes have previously been held to be constitutional. *See Jones v. State*, 660 P.2d 634, 643 (Okl.Cr.1983).

Accordingly, this proposition is without merit.

G.

[29] In his seventeenth proposition of error, Appellant claims the trial court erroneously allowed evidence of unadjudicated crimes and bad acts to be submitted to the jury. He points with particularity the evidence he murdered Mrs. Warner. He claims this violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution.

The evidence in question was used in support of the aggravating circumstance a probability existed Appellant would commit criminal acts of violence that would constitute a continuing threat to society. There is no requirement of a prosecution resulting in a conviction for this continuing threat aggravator to be applied. 21 O.S.1981, § 701.12(7).

13. That statute reads in pertinent part:
Aggravating circumstances shall be:
....
5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

Indeed, this Court has held that unadjudicated acts can be used to prove the defendant is a continuing threat to society. *Walker v. State*, 723 P.2d 273, 285 (Okl.Cr.1986), *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 600 (1986); *Johnson v. State*, 665 P.2d 815, 822–23 (Okl.Cr.1982). The reason for this was explained in *Johnson*, where this Court quoted from *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) to the effect that a jury can consider several things to determine whether a defendant should receive the death penalty, adding:

> This Court also finds persuasive the language used by the Model Penal Code. Section 210.6 of the Model Penal Code provides in part:
>
> In the proceeding, [sentencing] evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in ... this Section. Any such evidence, not legally privileged, which the Court deems to have probative force, may be received, ..., provided that the defendant's counsel is accorded a fair opportunity to rebut such evidence. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
>
> Therefore, it is not necessary there be a final conviction for an unrelated criminal offense to be admissible at the sentencing stage. Prior criminal activity is relevant to the jury determination on the aggravating circumstance the defendant would constitute a continuing threat to society. It is "essential that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek, supra*. The evidence of the Lawrence killing was properly admitted.

Johnson, 665 P.2d at 822–23. Here, Appellant was given ample opportunity to rebut the unadjudicated acts against Mrs. Warner, which he did in an exemplary manner. We find the evidence tested under the fire of cross-examination to be reliable. Accordingly, Appellant's proposition is without merit.

H.

[30] For his eighteenth proposition, Appellant alleges the "continuing threat" aggravating circumstance is vague and overbroad. We have repeatedly rejected that argument. *See Malone v. State*, 876 P.2d 707, 7715–16 (Okl.Cr.1994) and cases cited therein; *Snow v. State*, 876 P.2d 291, 298 (Okl.Cr.1994).

This proposition is without merit.

I.

As a follow-up proposition, Appellant contends the jury relied upon the unconstitutional aggravating circumstances of heinous, atrocious or cruel; continuing threat; and avoiding arrest or prosecution in arriving at its decision. As we have found none of the aggravators constitutionally infirm, this nineteenth proposition is without merit.

J.

[31] In his twentieth proposition, Appellant contends the death penalty procedure is unconstitutional, as it allows the prosecutor to have unbridled discretion in determining when to seek the death penalty.

We considered this identical argument in *Romano v. State*, 847 P.2d 368, 392–93 (Okl. Cr.1993), *aff'd*, 512 U.S. ——, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994), and rejected it there. We do so again.

K.

[32] In his twenty-first proposition of error, Appellant states the trial court allowed an improper application of the aggravating circumstance the murder was committed by a person while serving a sentence of imprisonment on conviction of a felony, 21 O.S.1981, § 701.12(6). A brief discussion is required here.

Evidence at trial showed Appellant had been sentenced to the penitentiary for two convictions of robbery with a firearm in Oklahoma County case CRF–80–3020. He was incarcerated January 19, 1981. After being

released, he commuted second degree burglary and was placed back in the penitentiary system on July 20, 1987. Appellant was admitted to the Pre–Parole Conditional Supervision (PPCS) program and the procedure was explained to him on June 27, 1989.

The evidence also established that under the PPCS program, if an inmate does not agree to abide by certain rules and conditions, he can be returned to prison. For the first month or so, Appellant did well on the program; however, he missed an office visit in August and had some curfew violations. The first part of September, Appellant's probation officer had decided to classify Appellant as a program failure and send him back to a lock-down unit; however, she was unable to do so because of a bed shortage in prisons. Mr. Sheppard was killed September 4; Mrs. Warner was killed September 16. During this time, Appellant was still in PPCS.

Appellant acknowledges he was on the PPCS program, but argues the aggravator the jury found does not apply to those in his situation.

The statute reads in pertinent part:

> Aggravating circumstances shall be:
>
> ....
>
> (6) The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;

Appellant argues the statute is only applicable to those inside the prison walls; therefore, he was not actually "serving" a term of imprisonment at a Department of Corrections institution at the time of the killing.

We have not addressed this particular aspect of this aggravator before. However, we have held those who are in the PPCS program are still incarcerated. *See Barnett v. Moon*, 852 P.2d 161, 162 (Okl.Cr.1993) ("... *pre* parole is by definition not parole, but a preparatory status to parole itself. And since "parole" means release from jail, prison or other confinement after actually serving part of a sentence, logically *pre* parole means *before* such release."); *Harper v. Young*, 852 P.2d 164, 165 (Okl.Cr.1993) ("As set forth in *Barnett*, the question concerning the PPCS program is not whether an inmate is in custody, because he is; but the degree of confinement used in that custody. The degree of confinement is not of concern to this Court, so long as an administrative procedure affords an appropriate method by which the decision to change the degree of confinement can be justified."). We have held in other areas an inmate need not actually be confined within prison walls to be considered imprisoned. *Hunt v. State*, 793 P.2d 1366, 1368 (Okl.Cr.1990) (defendant outside prison walls on limited pass can be convicted of "escape"); *McCoy v. State*, 536 P.2d 1309, 1312 (Okl.Cr.1975) (inmate who escapes from hospital can be convicted of escape). *See also Urbauer v. State*, 744 P.2d 1274, 1275 (Okl.Cr.1987) ("for purposes of escape from a penal institution, 'custody' may be restraint by either physical means or a superior force acting as a moral restraint.") Given these earlier cases indicating one need not be behind bars to be "imprisoned," and the fact the conditions of PPCS were explained to him when he was released from a correctional facility, Appellant cannot claim he did not have notice his status was the same.

Clearly, Appellant was "imprisoned" as the term is commonly defined. It seems obvious the Legislature enacted this aggravator in order to protect persons who, even though they may be incarcerated, are still members of society. It makes little sense to hold the aggravator can be used to protect one segment of society, while not protecting an even greater segment of that same society.[14]

Therefore, this proposition is without merit.

L.

[33] For his twenty-second and last proposition of error, Appellant claims as unconstitutional the statutory requirement a jury list aggravating circumstances as specific find-

14. The Alabama Court of Criminal Appeals was faced with a similar situation in *Whisenhant v. State*, 555 So.2d 219 (Ala.Cr.App.1984), *aff'd*, 555 So.2d 235 (Ala.1989), *cert. denied*, 496 U.S. 943, 110 S.Ct. 3230, 110 L.Ed.2d 676 (1990). There, a defendant committed a murder while on parole. The court held that was sufficient to satisfy the aggravating circumstance the murder was committed while "under sentence of imprisonment." *Id.*, 555 So.2d at 229, 231.

ings of fact before the death penalty can be imposed. He claims this runs afoul of the constitutional prohibition against special verdicts found in Okla. Const. art. 7, § 15.[15]

We have previously addressed that contention in *Romano v. State*, 847 P.2d 368, 384–85 (Okl.Cr.1993), *aff'd*, 512 U.S. ——, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994) We see no need to address it again.

VII. MANDATORY SENTENCE REVIEW

[34] This Court is required by 21 O.S. 1991, § 701.13(C) to determine whether (1) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, and (2) whether the evidence supports the jury's finding of aggravating circumstances as enumerated in 21 O.S. 1981, § 701.12. Pursuant to this mandate, we shall first determine whether the evidence was sufficient to support the imposition of the death penalty.

The prosecution alleged five aggravating circumstances: Appellant was previously convicted of a felony involving the use or threat of violence to the person (21 O.S.1981, § 701.12(1)); the murder was especially heinous, atrocious, or cruel (21 O.S.1981, § 701.12(4)); the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution (21 O.S.1981, § 701.12(5)); the murder was committed by a person while serving a sentence of imprisonment on conviction of a felony (21 O.S.1981, § 701.12(6)); there existed a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society (21 O.S.1981, § 701.12(7)).

The jury found the existence of all five. We have addressed the sufficiency of the evidence supporting murder during imprisonment; and the evidence supporting the aggravator he killed Mr. Sheppard to avoid arrest or prosecution for burglary.

[35] To show prior violent felonies, the prosecution presented witnesses who had been victims of a robbery and car theft committed by appellant in 1980. The witnesses were getting in a vehicle outside a supermarket in Oklahoma City when Appellant approached them, pointed a pistol at them and angrily threatened to blow their heads off if they did not give him their money and the car keys. Another witness testified Appellant became friendly with her to the point she began to feel uncomfortable around him and would not answer her door when he would attempt to visit her. One night when she arrived at her Bethany apartment she saw movement in her apartment before she entered. She notified police, who chased down and arrested Appellant. Appellant had rifled through her belongings; and was carrying an electrical cord he had ripped from an appliance in the apartment. The cord was approximately five and one-half to six feet long; and the clear implication was Appellant intended to use the cord in some manner against the woman who occupied the apartment. Evidence showed Appellant was convicted of two counts of robbery relating to the supermarket holdup, and one count of second degree burglary relating to entering the woman's apartment in Bethany.

This evidence is sufficient to support the aggravating circumstance Appellant was previously convicted of a felony involving the use or threat of violence to the person.

[36] Also supported by the evidence is the aggravating circumstance there existed a probability Appellant would commit criminal acts of violence that would constitute a continuing threat to society.

Mr. Sheppard was killed on or about September 4, 1989. On September 17, the brutalized body of Monteen Warner was found inside her home at 1021 N.E. 6th, a few blocks from Mr. Sheppard's home. A television set was missing from the home. Ms. Warner was naked from the waist down, a plastic bag over her head. A nylon rope or belt was found underneath her. Also found under the body was a wooden mallet broken in two. A sharpening steel, bent at the handle with traces of human blood on it, was also found; the object was apparently hammered into the victim's throat. In addition, numerous bruises were found on her body. An autopsy revealed she had been choked with enough force to break a bone in the neck. Cause of death was suffocation. Evidence both at the scene and from other witnesses connected Appellant to this crime. The evidence also indicated Appellant had performed some yard work for Ms. Warner, and was unhappy about how much he was paid.

Other evidence showed Appellant seriously beat a fellow inmate in the county jail in June 1990. Witness heard Appellant tell the inmate, David Schnelle, he was going to kill him. Schnelle had to be hospitalized; he required surgery to remove a broken bone from his retina, an eye was knocked out of its socket, and a cheek bone was broken in the beating. No explanation was given for the beating; but Appellant became angry at Schnelle several days before during a card game, and had threatened to beat him.

In February 1992 during a search of Appellant's cell, authorities found a homemade ice pick consisting of three metal rods (originally reinforcement rods in the concrete around the jail windows) sharpened at one end and tied together with torn sheets.

This evidence more than supports the aggravating factor that there existed a probability Appellant would commit criminal acts of violence that would constitute a continuing threat to society.

[37] The remaining aggravating circumstance is the murder was especially heinous, atrocious, or cruel. The 86–year–old Mr. Sheppard was stabbed in the abdomen; there were three stab wounds on the left side of the victim's neck; there were cuts on his hand. The characteristics of the wounds indicated they may have been made by someone behind the victim, who reached around and stabbed him in the front. The cuts on the hand indicated the victim struggled to fend off the knife. The knife wound to the abdomen was two and one-eighth inches wide, and extended at least four and one-half inches into the body, damaging the large intestine, small intestine, the liver, and the diaphragm. The medical examiner testified death was not immediate; the victim could have lived as long as 30 minutes or more. The crime scene revealed blood all over the bedroom, including large puddles on a dresser, as if the victim had doubled over the dresser at some point. He was not found in front of the dresser. Presence of the blood throughout the bedroom indicates the victim did not immediately lose consciousness after being stabbed repeatedly; rather, he moved around the room before falling between the bed and the wall.

In the light most favorable to the prosecution, this evidence supports the jury's finding the murder was especially heinous, atrocious or cruel. It showed the victim suffered serious physical abuse while still conscious.

In contrast to this evidence in support of aggravation, Appellant presented the following mitigating circumstances: he was abandoned by his father by age 3; by age 4 he was begging on the streets; his developmental history was slowed by a poor home life; an adverse psychological impact of being told his parents had been killed, when they had not been; the only father figure in his life was killed by his mother while he was still relatively young; his growth years were marred by a mother with alcohol problems who physically abused him by beating him with extension cords, sticks, bats and other items; his mother's rejection of him after he was released from a delinquent boys' home; adverse influences and condition at the boys' home; he had been institutionalized for approximately 12 years of his first 18 years of life; he was sexually abused while in prison; he was addicted to drugs at an early age, and was addicted at the time of the homicide.

Reviewing the evidence in mitigation and aggravation, we find the sentence of death to be factually substantiated and appropriate. We find no indication the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor.

VIII. CONCLUSION

Finding no error warranting reversal or modification, the judgment and sentence for Murder in the First Degree is AFFIRMED.

15. That section reads:
In all jury trials the jury shall return a general verdict, and no law in force nor any law hereafter enacted, shall require the court to direct the jury to make findings of particular questions of fact, but the court may, in its discretion, direct such special findings.

JOHNSON, V.P.J., and LANE and STRUBHAR, JJ., concur.

CHAPEL, J., concurs in results.

Michael Anthony TAYLOR, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. F-89-707.

Court of Criminal Appeals of Oklahoma.

Jan. 31, 1995.

Following admission of DNA evidence, defendant was convicted in the District Court, Oklahoma County, of first-degree burglary, first-degree rape, forcible oral sodomy, and first-degree robbery. Defendant appealed. The Court of Criminal Appeals, Chapel, V.P.J., held that: (1) *Daubert* test would be adopted for determining whether novel scientific evidence could be admitted through expert testimony; (2) DNA match evidence obtained through restriction fragment length polymorphism (RFLP) method, and DNA statistics calculated through standard population genetics formulas, pass *Daubert* test for determining whether novel scientific evidence is admissible, and trial courts faced with DNA profiling evidence produced through these means need not conduct *Daubert* pretrial admissibility hearing; (3) judge's decision to admit or exclude novel scientific evidence would be subjected to independent, thorough review rather than to review for abuse of discretion; (4) defendant's convictions for both first-degree burglary and first-degree robbery did not violate prohibition against double jeopardy; and (5) defendant waived right to present evidence of incompetency at postexamination competency hearing.

Johnson, P.J., and Lane, J., specially concurred and filed separate opinions.

Lumpkin, J., concurred in result and filed opinion.

1. Criminal Law ⇐388.2

Match between two DNA samples is not as conclusive as match between two fingerprints.

2. Criminal Law ⇐388.1, 472

Establishing proper application of techniques in question to case at issue is not part of *Frye* test for determining whether novel scientific evidence may be admitted through expert testimony.

3. Criminal Law ⇐388.2

Admissibility of DNA evidence presented against defendant was not conditioned upon laboratory's proper performance of testing procedures; any allegations of error in testing process affected weight of DNA evidence, not its admissibility.

4. Criminal Law ⇐388.1, 472

Court of Criminal Appeals would adopt *Daubert* test for determining whether novel scientific evidence may be admitted through expert testimony, and abandon *Frye* test; *Daubert* test, which is more flexible than *Frye* general acceptance standard, provides uniform method of addressing admissibility of expert testimony on all types of scientific evidence, ensures that relevant evidence rules are properly considered, and prevents courts from surrendering to scientists the responsibility for determining reliability of evidence. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

5. Criminal Law ⇐388.1, 472

Under *Daubert* test for determining admissibility of novel scientific evidence, trial judges must act as gatekeepers, ensuring that all novel scientific evidence is both reliable and relevant; to be reliable, qualified expert's opinion must be about scientific knowledge, or, stated another way, expert's inferences or assertions must be grounded in methods and procedures of science, derived by scientific method and supported by appro-

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

BYRON KEITH COOPER,

Petitioner,

-v-

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

APPENDIX "B"

Order Denying Rehearing and Directing Issuance of Mandate filed February 13, 1995

IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 13 1995
JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BYRON KEITH COOPER, Appellant,

v. Case No. F-92-533

THE STATE OF OKLAHOMA, Appellee.

AUTHORIZED FOR FILING
FEB 13 1995
COURT OF CRIMINAL APPEALS

ORDER DENYING REHEARING
AND DIRECTING ISSUANCE OF MANDATE

Petitioner has filed a Petition requesting this Court grant rehearing and stay the mandate in Cooper v. State, ___ P.2d ___, 66 OBJ 166 (Okl.Cr. 1-10-95). In it, Appellant alleges two reasons why rehearing should be granted: this Court erred in ruling the presumption of innocence is a state, and not federal constitutional right; and this Court erred in ruling a mental health professional could give an opinion based on inadequate medical records.

We find Petitioner is not entitled to a rehearing as he has failed to show that our opinion in this case conflicts with current case law or an express statute; and he has not presented this Court with some question decisive of the case that has been submitted by the attorney of record and overlooked by this Court. Those are the sole grounds upon which rehearing can be based. See 22 O.S.Supp.1994, Ch. 18, App. Rules of the Court of Criminal Appeals, Rule 3.14(B)(1) & (2).

This Motion for Rehearing is DENIED. The Clerk of this Court is ordered to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 13th day of February, 1995.

CHARLES A. JOHNSON, Presiding Judge

NOT PARTICIPATING
CHARLES S. CHAPEL, Vice-Presiding Judge

GARY L. LUMPKIN, Judge

JAMES F. LANE, Judge

RETA M. STRUBHAR, Judge

ATTEST:
Clerk

RECEIVED
AUG 16 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 95-5207

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
AUG 14 1995
CLERK

BRYON KEITH COOPER,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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August 14, 1995

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QUESTIONS PRESENTED

1. Whether it is constitutional for a state to require a criminal defendant to sustain his claim of incompetency by clear and convincing evidence.

IN THE SUPREME COURT OF THE UNITED STATES

BYRON KEITH COOPER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 95-5207**
	)	
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Comes now Respondent, the State of Oklahoma, by and through W.A. Drew Edmondson, Attorney General of the State of Oklahoma, and in respond to Petitioner's Petition for Writ of Certiorari, states the following:

STATEMENT OF THE CASE

Byron Keith Cooper, hereinafter referred to as Petitioner, was tried and convicted for first degree murder in violation of Okla.Stat.tit. 21, 701.7(A) in the District Court of Oklahoma County. On September 8, 1989, the body of Harold Sheppard was found in his home at Northeast 13th and Fonshill streets in Oklahoma City, Oklahoma. Based on interviews with people in the neighborhood, authorities estimated that Sheppard was stabbed to death September 4, 1989. Petitioner became a suspect after using Mr. Sheppard's J.C.Penney card. Petitioner initially admitted murdering Mr. Sheppard but later retracted the admission. A watch and two camera belonging to Mr. Sheppard was found in the home where Petitioner had been staying. At Mr. Sheppard's house, authorities found Petitioner's fingerprints on a flashlight, a

metal can, a watch case and a carton of cigarettes. Petitioner's prints were also found on the charge receipt he signed at the J.C. Penney store at Shepherd Mall.

The jury found the existence of five aggravating circumstances: (1) that Petitioner had previously been convicted of a felony involving violence; (2) that the murder was especially heinous, atrocious or cruel; (3) that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; (4) that the murders were committed while Petitioner was serving a sentence on a felony conviction; and (5) that there existed a probability Petitioner would commit criminal acts of violence which would constitute a continuing threat to society.

On January 10, 1995, the Oklahoma Court of Criminal Appeals issued an opinion affirming Petitioner's conviction in Cooper v. State, 889 P.2d 293 (Okl.Cr.1995). Rehearing was denied February 13, 1995. Petitioner is now seeking review by this Court.

SUMMARY OF THE ARGUMENT

Under Oklahoma law, a criminal defendant has the burden of proof in demonstrating whether he is competent to stand trial. This burden is sustained by introducing clear and convincing evidence. The defendant is presumed to be competent for the purposes of the allocation of the burden of proof and burden of going forward with the evidence. Okla.Stat.tit. 22 § 1175.4 (B) (Supp. 1994). Petitioner claims this standard of clear and

convincing evidence is so harsh that it violates Petitioner's right to due process under the Fourteenth Amendment.

In the opinion below, The Oklahoma Court of Criminal Appeals found that Oklahoma's competency statutes are constitutional as they did not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". Cooper, 889 P.2d at 303 quoting Medina v. California, 505 U.S. ___, 112 S.Ct. 2572, 2577, 120 L.Ed.2d 353, 363 (1992).

REASONS FOR REFUSING TO GRANT THE WRIT

PROPOSITION I

THE OKLAHOMA STATUTES ALLOCATING THE BURDEN TO THE DEFENDANT TO PROVE INCOMPETENCY BY CLEAR AND CONVINCING EVIDENCE DO NOT VIOLATE DUE PROCESS.

Oklahoma statutes provide that, in order to be competent, a defendant must have sufficient ability to consult with an attorney and the defendant must be able to understand the nature of the charges and proceedings being brought against him. Okla.Stat.tit. 22, § 1175.1 (1991). Once an application to determine competency has been filed, the court must hold a hearing to examine the application. If the court finds the application to have merit, the court must order an examination by doctors or appropriate technicians who shall examine the defendant and determine if he can appreciate the nature of the charges, if he is capable of assisting his attorney and others. Okla.Stat.tit. 22, § 1175.3 (Supp. 1993). Following an initial determination by doctors or technicians, the court is required to hold a hearing on the issue of competency. At

that hearing, the defendant is presumed competent and must prove by clear and convincing evidence he is incompetent. Okla.Stat.tit. § 1175.4 (1991).

Petitioner, relying on Medina v. California, 505 U.S. ___, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992), argues that requiring him to prove his incompetence by clear and convincing evidence violates due process standards. Petitioner contends the burden of proof should be by a preponderance of the evidence. He claims requiring the defendant to sustain the burden of proof by clear and convincing evidence is violative of the Due Process Clause.

The Oklahoma Court of Criminal Appeals' opinion in this case h in which Oklahoma's statutes governing competency were found to be constitutional is thorough and well-reasoned. That court began its analysis with a discussion of the fundamental concept of Due Process. The court noted:

> It may however be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights.

Cooper, 889 P.2d at 301 quoting Stuart v. Palmer, 74 N.Y. 183, 191, 194 (1878). The court noted this Court's pronouncement that Due Process Clause has limited operation and that the category of infractions that violate "fundamental fairness" has been defined very narrowly". Cooper, 889 P.2d at 301 quoting Medina, 120 L.Ed.2d at 362.

As the Oklahoma court recognized, this Court in Addington v. Texas, 411 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) held

that the function of the burden of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication". The Addington court also noted the standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decisions. The Oklahoma court noted that, in considering what standard should govern in a competency proceeding, it must assess the presumption of competency with the extend of the defendant's interest in not being tried while incompetent and the State's interest in being assured a defendant is not attempting to feign incompetence. Cooper, 889 P.2d at 302. The court also noted that a truly incompetent criminal defendant, though his attorneys and experts, can prove incompetency with relative ease. Cooper, 889 P.2d at 303. Balancing these standards, the court found that forcing a defendant to prove by clear and convincing evidence does not offend principles of fundament fairness. Id.

This is consistent with this Court's holding in Olim v. Wakinekona, 461 U.S. 238, 250, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983) that "process is not an end in itself". The constitutional purpose of due process if to protect a substantive interest to which an individual has a legitimate claim of entitlement. Id. The interest here is that a defendant may not be tried while incompetent. The procedures for protecting this interest are left to the individual states.

This Court has emphasized the preeminent role of the States in preventing and dealing with crime and the reluctance of the Court to disturb a States' decision with respect to the definition of criminal conduct and the procedures by which the criminal laws are to be enforced in the courts, including the burden of producing evidence and allocating the burden of persuasion. Martin v. Ohio, 480 U.S. 228, 232, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987).

In Parke v. Raley, 506 U.S. ___, 113 S.Ct. ___, 121 L.Ed.2d 391, 405 (1992), this Court noted, in the context of allocating the burden of proof in challenging the validity of a prior guilty plea to the defendant, that "[t]he Due Process Clause does not, however, require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused". Parke, 121 L.Ed.2d at 405, quoting Medina, 120 L.Ed.2d at 367.

Oklahoma has chosen to require a clear and convincing standard to the quantum of proof required to prove incompetent. Petitioner claims he had previously been found to be incompetent and it was against fundamental fairness to require him to take responsibility for proving his incompetency be clear and convincing evidence.

In Medina, this Court held that allocating the burden of proof to the defendant in competency proceedings does not violate due process standards. Although the issue in Medina was who bore the burden of proof rather than the standard of proof, the rationale behind the Medina decisions is equally applicable to a challenge as to the proper burden of proof standard. The rationale behind the Medina decision is that while a defendant has a right not to stand

trial while incompetent, states are free to establish their own rules for determining competency. The Court held:

> Once a State provides a defendant access to procedures for making a competency evaluation, however, we perceive no basis for holding that due process further requires the State to assume the burden of vindicating the defendant's constitutional right by persuading the trier of fact that the defendant is competent to stand trial.

Medina, 120 L.ed.2d at 366. The Medina court also dispelled the argument made by Petitioner herein that it is against fundamental fairness to demand that the defendant take responsibility for proving his incompetency. The Court held:

> Once a competency hearing is held, however, the defendant is entitled to the assistance of counsel, and psychiatric evidence is brought to bear on the questions of the defendant's mental condition. Although an impaired defendant might be limited in his ability to assist counsel in demonstrating incompetence, the defendant 's inability to assist counsel can, in and of itself, constitute probative evidence of incompetence, and defense counsel will often have the best-informed view of the defendant's ability to participate in his defense.

Medina, 120 L.Ed.2d at 366 (citations omitted). This is true regardless of whether the standard if by a preponderance of the evidence or by clear and convincing evidence. This is also true regardless of whether the defendant had previously been adjudicated by a court to be incompetent to stand trial.

This Court has recognized that a state procedures does not run afoul of the Constitution simply because another method may seem to be fairer or wiser or to "give a surer protection to the prisoner at the bar". Medina, 120 L.Ed.2d at 367 quoting Snyder v.

Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed 674 (1934). State procedures are only unconstitutional if they "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". Medina, 120 L.Ed.2d at 364. The Oklahoma court acknowledged this concept and properly found that requiring Petitioner to bear the burden of proof by clear and convincing evidence did not violate fundamental fairness. Petitioner has presented nothing to the contrary and this Court should deny review of this issue.

CONCLUSION

Petitioner has provided no basis for review by this Court. The Oklahoma statute allocating the burden of proving incompetency to the defendant by clear and convincing evidence is a proper exercise of state legislative power and does not violate due process. This Court should refuse to grant certiorari review.

Respectfully submitted,

W.A. DREW EDMONDSON
ATTORNEY GENERAL

Sandra D. Howard

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SUPREME COURT, U.S.

NO. 95-5207

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRYON KEITH COOPER,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

CERTIFICATE OF SERVICE

I, Sandra D. Howard, a member of the bar of this Court, do hereby certify that I have this 14th day of August, 1995, served a copy of Respondent's Response to Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals on counsel for Petitioner, Robert A. Ravitz, Oklahoma County Public Defender, 320 Robert S. Kerr, Room 611, Oklahoma City, OK 73102, with adequate first class postage All parties required to be served have been served.

Sandra D. Howard

SANDRA D. HOWARD

Supreme Court, U.S.
FILED
NOV 14 1995
CLERK

No. 95-5207

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BYRON KEITH COOPER,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Oklahoma

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 13, 1995
CERTIORARI GRANTED OCTOBER 5, 1995

103PP

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RELEVANT DOCKET ENTRIES

DATE	ENTRY
August 8, 1990	Defense counsel filed Application for Determination of Competency. Judge Eugene Mathews entered Order directing Department of Mental Health to examine Petitioner at the Oklahoma County Jail and make determinations as to the statutorily required questions.
August 27, 1990	Post-Examination Competency Hearing held before Judge Bana Blasdel; upon finding of incompetency, Petitioner was committed to Eastern State Hospital for further evaluation and treatment.
December 20, 1990 and January 18, 1991	Upon Petitioner's return from Eastern State Hospital, a second post-examination competency hearing was held before Judge Richard Freeman. Finding Petitioner competent, Judge Freeman entered Order to Resume Criminal Proceedings.
May 4-5, 1992	On the day trial was to begin, another competency hearing was held, at the conclusion of which District Judge Richard Freeman determined Petitioner to be competent to stand trial under Oklahoma's standard of "clear and convincing."
May 5-22, 1992	Petitioner was tried for and convicted of Murder in the First Degree for the murder of Harold Sheppard. Following the penalty phase the jury assessed death.

DATE	ENTRY
June 5, 1992	At formal sentencing, Petitioner's lead attorney objected to proceeding on the ground that Petitioner was incompetent. Court overruled the objection and sentenced Petitioner to die by lethal injection.
January 10, 1995	Court of Criminal Appeals of Oklahoma affirmed conviction and sentence.
February 13, 1995	Court of Criminal Appeals of Oklahoma denied petition for rehearing and directed issuance of mandate.

DISTRICT COURT OF OKLAHOMA COUNTY

No. CF-89-5084

THE STATE OF OKLAHOMA

vs.

BYRON KEITH COOPER

TRANSCRIPT OF PROCEEDINGS
MOTION HEARINGS HAD ON APRIL 29, 1992

Before the HONORABLE RICHARD W. FREEMAN,
District Judge.

[207] MR. MILDFELT: * * * I have one last issue that I need to make a record on if I'm not cutting anybody off.

THE COURT: All right.

MR. MILDFELT: Mr. Cooper, today, and I need to make a record on this. I think he's faking, I don't know how the Court feels, but this week or last week he lunged at or swung or appeared like he was going to hit Mr. Ravitz and Mr. Bush got between them. Because I didn't come over there. Mr. Ravitz is my co-counsel and he and I were not communicating. The last time we communicated we were hollering at one another through the bars up in the jail.

Today, at one point when I got too close to him, he grabbed a chair and told the deputies to keep me away from him. He has hollered in here so loud at times that the court reporter couldn't hear what was going on [208] and I was screaming at the top of my lungs. I think he

has cried, too. I have tried not to watch him or zero in on that because I could hear him.

This afternoon or at least what parts that I have seen him, and this may not be accurate all afternoon, that he has sat there with his head down. Now, he may have looked around some, but most of the times that I have looked at him his head is looking down.

I raise all of this because in my opinion he is faking, but I am not a doctor. I have two of my investigators that think he's cracking up. I think he's faking. This is a capital murder case, death penalty. If Mr. Miller wishes to name somebody, pick a psychiatrist of his choice, we will pay for it, have him examined tomorrow, just to see, you know, what assessment is correct, because I'm not a doctor and I get into these cases and I'm ready for trial and I say I'm ready for trial and I say he's faking. But I'm not a doctor and so I want to be fair, so I'm not picking a hired gun.

THE COURT: Are you raising insanity?

MR. MILDFELT: Not as a defense to the crime but incompetence, I have to do that, because the Court's seen him and seen him act today and we've got a week or two weeks of trial coming up and I perceive a very difficult situation. He is not communicating with me, [209] he's not happy with me. I don't know where he's going to sit in the courtroom. I don't know whether he's going to allow himself to be dressed out. I don't know whether he's incompetent or whether he's faking.

And, yes, I'm raising that issue and I just allow it to the Court, let the D.A. pick whomever they want to go look at him and we'll pay for it. We've got a court fund with 40 big ones in it and we'll pay for it but I think we ought to assure ourselves of that before we proceed out.

THE COURT: Well, are you telling me that you're unable to defend him or what are you saying to me now? You know, he's been adjudicated competent.

MR. MILDFELT: Competent before this Court.

THE COURT: And I will say after viewing the tape of his interview he's quite an intelligent person. He has a good command of language. There's not the slightest indication to me on that tape that he isn't very sound. He's a sharp individual.

Now, I understand people can come and go and I understand he's been in jail for quite a while. This case has lain dormant for some time because of the inability of the defense to get funds, I understand, but I don't know that that has been a hindrance to the preparation of the case because really, I don't know what [210] you have in the way of evidence, if any, that you intend to offer.

But the big burden appears to me to be on the State rather than the defense, but I do know you need the cooperation of your client to a defendant. So, what are you really talking about?

MR. MILDFELT: Well, Judge, I just want to make sure that the record is clear. He and I are not communicating, that's obvious.

THE COURT: I've seen the letters.

MR. MILDFELT: He's accused me of trying to kill him with a nylon rope. He says I hit him.

Now, I bond with my clients and it is not above me to kind of punch them on the shoulder in a fatherly sort of way, not in a way of anger and I would never touch a client in anger unless a client grabbed me.

He and I did get in a hollering match the last time I talked to him. He refused to talk to me about this case at all, refuses to acknowledge that he has this case. Continues to talk about a rape case and a kidnapping case and that the girl won't show an that he's been screaming and hollering over here today, that see the girl, as if the girl had testified. And he cried I believe this afternoon or this morning.

THE COURT: Well, he's been adjudicated [211] competent and I've observed him on the tape to be competent and the fact that he may be putting on an act or not now, I'm not the least bit concerned about that, personally.

MR. MILDFELT: Well, I think it can raise it's ugly head at any time.

THE COURT: It can. And if he creates a disturbance during the trial I think, if he is faking and if he does do that, that's going to go against him? The jury's not going—

MR. MILDFELT: But if he's not faking, Your Honor—

THE COURT: It's a travesty, perhaps. We're talking about two things. Insanity as a defense to a crime or incompetence to assist counsel. So, if an incompetent person is convicted of a crime that he committed when he was sane, I don't see any harm's done.

MR. MILDFELT: All right, Your Honor, if that's the Court's ruling. I just wanted you to know that we would pay for it.

THE COURT: Do you want to have him examined?

MR. MILLER: No. Judge, but if he is incompetent today, if someone were to raise a question of his competency, I believe we'd have to have a hearing to decide if he is.

[212] THE COURT: I think so.

MR. MILLER: But Mr. Mildfelt has said three times the word faking and that's his opinion. No one else has raised the issue of his competency and for the record, I've seen the man two weeks in a row at formal arraignment and on another charge, possession of a weapon that he made in the jail charge that we prelimed. I prelimed the offense about three weeks ago. I went down to formally arraign him one day and then the Judge passed it on over to another day.

I observed him three times and when he's not talking about this case, he seems to be just fine. He may be belligerent, but he never acted like he didn't know what was going on around him. And for my perspective, I think I have the right or the duty to come forward if I thought he was incompetent.

THE COURT: You both have the duty if you think he's incompetent to come forward and—

MR. MILLER: And neither one of us do, Judge, so that's the test. If he's incompetent today or we have a question about it, we have to have him looked at, but I don't think he is, Mr. Mildfelt doesn't think he is. The Court already indicated he doesn't think—

MR. MILDFELT: Gentleman, I have two people in my office, investigators, that think he is. I don't [213] think he is and I only say that for the record because I'm going to be candid in front of the Court. I'm an officer of the Court. I don't think he is, but two of my investigators think he is. I'm not a doctor.

THE COURT: What you think counts in the court, of course. If you have any evidence you want to put on to that effect or if you want to have him examined yourself and you have the funds, while feel free to do so.

* * * *

DISTRICT COURT OF OKLAHOMA COUNTY

(Title Omitted in Printing)

TRANSCRIPT OF PROCEEDINGS
PRE-TRIAL MOTIONS AND COMPETENCY HEARING
HAD ON MAY 4 AND 5, 1992

Before the HONORABLE RICHARD W. FREEMAN,
District Judge.

[99] Q (By prosecutor) Do you see him talking like he is right now off to nobody like he's talking about some rape charge or something?

A (By Charles Owen Smith) He stays in his room it seems like a lot, you know, talking to himself. . . .

* * * *

[102] Q (By defense counsel) And you have, if I understood correctly, seen him in his room talking to himself like he's doing sitting over in the corner today here in the courtroom?

A (By Charles Owen Smith) Yes, sir, I have.

* * * *

[106] Q (By defense counsel) Now, when you say he talks to himself, do you see him talking to himself over there now?

A (By Anthony Boult) Yes.

* * * *

[188] DR. PHILIP MURPHY

Called as a witness on behalf of the Defendant, after first being duly sworn, testified on his oath as follows; to wit:

DIRECT EXAMINATION

BY MR. MILDFELT:

Q Would you state your name for the Judge, please?
A Yes, Philip J. Murphy.
Q And what is your profession or occupation, please?
A I'm a licensed clinical psychologist.
Q Can you tell us about your educational background?
A Yes, I received a Bachelor's in psychology and biology from City College of New York in 1967, a Master's and Ph.D. in clinical and physiological psychology from the University of Maryland in 1972.

I was involved in a one-year internship at Creedmoor State Hospital from 1970 to '71, which is a state hospital in New York State and a one-year clerkship at the Washington Veterans Administration Hospital for 1971 to '72.

Q And when did you get your Doctorate?
A I passed my orals in '72, then I went on to be a [189] professor or an associate professor tenured at Oklahoma State University from 1972 to 1982.

Q What else have you done experience-wise that qualifies you to be a clinical psychologist?

A Part of the training has to do with receiving a Ph.D. in clinical psychology in a nationally-approved training program which the University of "O" was. The internship was also A.P.A. approved at Creedmoor State Hospital.

Upon completion of your dissertation and having all the court work and the clinical clerkships, then you receive your degree. Then I was licensed in the state of Oklahoma in 1975, and have been in continuous private practice since that time.

Q Have you been qualified to testify in courts in the state of Oklahoma before this day?
A Yes, I have.
Q Did your office contact you yesterday, doctor, to examine Byron Keith Cooper?
A Yes.

Q And did you perform an examination of him some time in the evening hours of May the 4th, last night?

A That's correct.

Q Prior to that examination, did you review any records from Eastern State Hospital?

[190] A Yes, I did.

Q And can you tell me what, if anything, those contributed to your examination, the records that you examined from Eastern State Hospital?

A Yes, they did. The records from Eastern State Hospital begin in August, I think August 28th of 1990. He had been sent to Eastern State for competency following Dr. Edith King's evaluation that he was not competent just prior to that in August of 1990, so they sent him up there for an evaluation.

When he first entered Eastern State, both Dr. Patterson and Dr. Lazarica (spelled phonetically), both found him to be severely ill, looking very schizophrenic, thought disorder, very psychotic. Inside of a month, by the end of September, and by the way, they placed him on Halidol at that time, which is an antipsychotic medication, which would fit that diagnosis.

However, by the end of the month of September, Dr. Lazarica was feeling that he wasn't seeing much schizophrenia in the man. What he was noticing more was other types of borderline problems, personnel disorder problems, sociopathic problems.

When you look then in the nursing record then in October, you come up with things like, and this is from the nurse, this is a world-class, first-class [191] manipulator, seems to want his way a little more and etcetera, etcetera.

They took him off Halidol at the latter part of September and the reason for that was that Dr. Lazarica felt that he really didn't see any dose response curve between the Halidol they were giving him and any benefit it was having on the patient.

They finally released him back to Oklahoma County in December, basically feeling he was competent at that time to stand trial. He had been on some antidepressants after he was on Halidol and the antidepressants were for a different problem.

They did a blood level on his antidepressants some time in November and found interestingly that one of his blood levels was lower than would be expected. My clinical interpretation of that was that in fact his system was clearly needing that type of medicine and in fact, was overutilizing it and that's why in fact one of the blood levels had come up low.

Q And they had taken him off of it?

A No, this was when he was on it. They have certain expectations with a given dose of what his blood level should be. And one of the particular metabolites of the antidepressant he was on, showed low.

What I'm saying is that clinically when I see that [192] it's almost diagnostic information. It's like that system really has an affinity for that drug and therefore it's utilizing it and coming up lower than expectation on the blood level.

Q Anything else you gathered from Eastern State records before you went to see him that you thought was significant at that time before you go see him?

A Well, yeah, there was on the diagnosis going in, he had part of the five axis diagnosis that's used today, in psychiatric diagnosis is a focal level of functioning. His focal level of functioning when he came in was rated at a 15. A 15 was based upon his being apparently mute, very noncommunicative.

That is interesting in that also a 15, which is an extremely low number saying the person's barely fuunctioning at all would be gotten from smearing feces. And I thought that that was interesting consistency given some of the evidence that had been spoken about yesterday.

Q Now, after you had all that information, did you go over and see him in County Jail?

A I did, last night.

Q And did you make an examination, however you do that and conduct some tests with him?

A I did.

[193] Q As a result of your examination and your tests with him, what did you determine?

A Well, it's complicated so I'll sort of list them.

First, some part of his behavior is due to malingering. He is attempting to look worse than he is.

Q Okay.

A Secondly, that I think that he's not schizophrenic but that he suffers from an affective, major affective disorder which would be on a separate branch of mental illness than schizophrenia, which is a thought disorder.

Q But it is a form of mental illness?

A Yes, it is and it is episodic, meaning that he is going to get bad and then all by itself, even without medication, come back up to levels of functioning he had before. I think that's what happened, in fact, back in August of 1990, when he first went to Eastern State.

I think he had an active exacerbation of that illness. That's what he looked like. He was probably psychotic at that time. That's what people were seeing and they were presuming that he was schizophrenic. When he remitted in about a month, that's where everybody was confused about what's going on with this guy. He's not responding perfectly to the medicine. So that's the second finding.

The third finding is that he, even when I was able [194] to get to the point of speaking quite coherently with him, his thought patterns were quite clear, showed no evidence of any structural problems in his thinking. Then he would sort of confuse, and I don't mean that necessarily in a conscious way. His time sense to me seems confused. It was hard for me to track anything with him in time.

So, the third finding has to do with his ability to help you as counsel and at this point in time, I don't think that he can do that effectively. In that sense, I don't judge him to be competent right now.

Q * * * There was some testimony yesterday, I don't know whether you were present when that was given, about a person called Noryb?

A Yes.

* * * *

Q Were you present when some of that came on?

A I saw the picture but I wasn't present when the more dramatic aspects occurred.

Q Did you discuss anything with him about Noryb?

A Oh, yes. Yes.

Q And what did you glean from that? What finding did you make from that?

A One, I think that Noryb is real. I mean, I do not [195] think that that is a part of his manipulation and his malingering. It is a complex inside his mind which probably, and I'm not going to be able to say one hundred percent, my belief is it's a combination of a step-father he had, who his mother had killed back when he was a young teenager or mid-teen. And I think, based on the information I have, that this man was probably the only positive father image that this man has experienced in his lifetime.

I think he represents, Noryb represents sort of a complex of God and father. He is very frightened of Noryb and yet he wants Noryb's protection. I think you personally represent Noryb in some degree to him and that's why he's afraid of you.

Q You believe he's honestly genuinely afraid of me?

A Yes, I do believe he is honestly afraid of you.

Q You don't think that's any part of any malingering whatsoever?

A No, that is not malingering.

Q Do you believe that in view of all of these facts that he can effectively communicate with me as his attorney?

A Not at this time.

Q Now, you talked about this disorder that he has. This is a recognized disorder?

[196] A Yes.

Q Is it treatable?

A Yes, it is.

Q How do you treat it?

A My suggestion would be to begin him on a regimen of Lithium and to see what effects that will have. I cannot say at this time whether he is manic depressive, which is one diagnosis on that affective disorder or whether he is major depression recurrent.

But along that line, Lithium would be the one medication that I think would have a clearer shot at helping him get clearer so that he could communicate effectively with you.

* * * *

Q Does the stress affect him?

A Yes, it does. The stress of going to court, of having these things come up is a problem. It probably adds to his decompensation and I think that that also is potentially treatable. And I think with minor anti-anxiety agents that that might be helpful in a sort of limited dose as he's preparing for these types of proceedings.

Q But the stress didn't cause the condition? It's a [197] mental condition that occurred before the stress, would that be fair?

A That's fair.

Q The stress just aggravates the condition?

A That is correct.

* * * *

CROSS EXAMINATION

[198] * * * Q (By Mr. Miller) Now, Doctor, you reviewed the records of Eastern State Hospital, right?

A That's correct.

Q And you reviewed the report, I'm sure, of Dr. King when she looked at him back in August of 90?

A Yes.

* * * *

[199] * * * Q And then you talked to the Defendant, right?

A Last night, that's right.

Q And what else did you do?

A Well, I was here yesterday afternoon observing him in the courtroom.

Q Okay. Anything else?

A That's probably the total amount of the data. I did also look at some records on his mother, some psychiatric records of his mother.

Q And you said that she was misdiagnosed as schizophrenic also?

A I believe that, yes. When I looked at those records I believe that probably the more proper diagnosis for her would have been very similar to him, meaning, more affective disorder.

Meaning, I believe that that would be more of an affective disorder.

* * * *

[200] * * * Q Who were the people testifying when you left?

A I don't recall. At the time the testimony was going on, I was reviewing notes, so I really wasn't tracking much who was up here testifying.

* * * *

Q Can you tell me what it was that you remember the witnesses saying that you heard that would affect your diagnosis?

A I don't think that there was anything that I heard from this seat that affected the diagnosis.

Q So the feces business, that has nothing to do with [201] it, right?

A The only consistency with the feces is one I mentioned that, I mean, I cannot say whether the feces is an effect of this man's disorder right now or whether that's part of the malingering.

* * * *

Q So, the bottom line, the things that all the prisoners—excuse me, the residents came in here and testified to of the County Jail, that wouldn't have any effect on you?

A No, meaning I could chalk that up to it being simply malingering. I could chalk it up to this is a partial decompensation to do with his getting ready for trial.

Q Partial? So at least part of it is malingering is what you're telling me?

A Yes, definitely.

Q Because the things that they were doing that they testified to that you heard of at least, a lot of those things weren't really consistent with the disorder that he has, is that true?

A Yeah, I think that's accurate.

Q Alright. Now, the testimony from some of the state's witnesses that same yesterday afternoon indicated that he acted rather normally.

[202] A Right, the guard who was on the previous pod.

Q That wouldn't be consistent, that kind of activity, normal conduct. That wouldn't be consistent with this disorder either, would it?

A The disorder that I'm talking about that he has?

Q Yes, sir.

A Yes, meaning it would be consistent because it's episodic meaning, what happens is the person goes through a period of time when he is ill, and then all on its own, even without treatment, he's going to come back to a previous level of functioning, so—

Q It can happen every five minutes?

A No, no. It would not be that quick. I mean, and I don't have enough information. In other people it can happen sometimes several times a day would be very, very fast. Sometimes it's years. So it has a long variation.

Q So it would be abnormal for him, what I'm hearing you say, it would be abnormal for Mr. Cooper to snap in and out of it, it would take longer than that?

A Meaning momentarily, yes.

Q How long would you normally expect him to be involved in this episodic disorder?

A Well, the only information we have really comes from Eastern State Hospital and I would think that at least from that data—and he was in a complete different [203] environment that it was, I don't know how long before Edith King had evaluated him that he had been there, but at least from the time that he was in Eastern State until the time that he apparently was out of the disorder was about a month.

Q So, if he was all right the day he came to court on the 4th in the morning, you wouldn't have expected him to have these kind of manifestations of the disorder in court, would you?

A Right.

Q And another thing, I'm sorry, another thing, if he was all right the morning he came to court on the 4th?

A You mean yesterday?

Q Yes. You wouldn't have expected him to be under the symptoms of this disorder the day before, then snap out of it and snap back into it the day of court? That's what you're saying, right?

A Right.

* * * *

[204] * * * A Again, how much of what we're seeing is malingering, I think some part of it is malingering, I think some part of it is the disorder.

Q If we put it on a continuum from zero to a hundred, you really don't know how much on what end, do you? How much is malingering and how much of it is the disorder?

A For most of the actions, yes, I don't know. * * * It would take a lot more study. At the same time, the fact that both are present, I think, is the more important finding. * * *

Q And the kind of time you're talking about is what they would have utilized at Eastern State Hospital for the three months from August 27th to November 26th that he was there, of 1990?

A Uh-huh.

Q Okay. And when he went down to Eastern after Dr. King looked at him, they had a history that was a lot like Noryb or Norid or whatever his name is—

A Right.

[205] Q And that his mama was dead, that was part of it, right?

A He told me last night that his mother was dead.

Q But that's the same thing he was saying back then according to the records, right?

A That's correct.

Q And that his lawyer was trying to kill him?

A That's correct.

Q That's true. And during the three-month initiated by Dr. King, the three months at Eastern, the doctors all thought at first that he was really sick, that he was psychotic, schizophrenic, right?

A What I'm saying is that he probably was psychotic, he was not schizophrenic, although it's hard when you take a snapshot of somebody to be able to know without a knowledge of the force of the illness, is this schizophrenia or is this psychosis of another fashion.

Q Dr. Murphy, the truth is, though, as you told me in the hall that Dr. King, in your opinion and the doctors at Eastern when they first diagnosed him in calling him schizophrenic, they were wrong?

A In that diagnosis, right.

Q Sure.

A But not in the diagnosis of psychosis, which is a more general term.

[206] Q Okay. Psychosis. That's having any disorder, right?

A Psychosis is having a serious disorder which basically gets in the way of your being able to have sufficient contact with reality to be competent, legally.

Q You mean every time anybody has a psychosis they're incompetent legally?

A Yeah, certainly they would be. They're out of their mind. That does not mean that somebody with let's say somebody who's schizophrenic diagnosis, they'll be schizophrenic their entire life. That does not mean that every moment in their lifetime that they are psychotic. Okay? They will go back into psychotic outbreaks from time to time.

Q All right. With Dr. King and doctors at Eastern, what you're telling me is that the wild look that Dr. King so scientifically described and the fact that he wasn't capable of impulse control, those things all led her to believe at the time from this snapshot view that he was schizophrenic?

A That's correct.

Q Now, you're saying that's not right, he was an affect disorder that's not at all related, correct?

A That's correct.

Q Now, Doctor, you also read Dr. Russell's estimation [207] of him when she shipped him back in November?

A Yes, I did.

* * * *

Q And in that report she says that she believed his symptoms are more consistent with classified malingering that it is with any—I think she says psychosis, basically, doesn't she or disorder?

A This is the last line of the report, "Mr. Cooper does not appear to meet the criteria for a clinical syndrome,

however, his symptoms and supporting documentation appear to be indicative of a V code malingering, D.S.M. III-R. I can explain what that means.

[208] Q Go ahead.

A At the time when he's being discharged, he is fine. They've got him off all medicine, he's coherent, he's doing fine. So, at that point in time, he does not, an example would be he wouldn't have a cold. He wouldn't be showing symptoms of any particular disorder at that time. And clearly, he also seemed to be based on some of their other—his manipulation on the ward, his—the comment I made about a first class manipulator in the nursing chart, yeah, he probably would warrant a V code malingering. * * *

[209] A * * * It's really all understandable, meaning when he first comes in he's sick. It's apparent to Dr. King, it's apparent to Dr. Patterson, Dr. Lazarica and when you see somebody and you just see them in a psychotic state, especially in America, the first thing you think of is thought disorder. They look schizophrenic.

A normal person who, if they had a breakdown and you saw them acutely ill, they would look schizophrenic. It takes a longer look at the course of the illness to decide in fact is that initial diagnosis of schizophrenia valid or does another diagnosis be warranted.

At the time when Dr. Russell is writing this report, she's looking at him and at that moment in time, after he's been over his episode of effective disorder, he is fine. What she's saying is, hey, there's nothing wrong with this guy and at that moment in time, there isn't anything wrong with this guy. What's she's saying then is, hey, based on his ward behavior, I think he's malingering at this moment.

[210] Now, interestingly, when he was taken off Halidol, he wanted himself to be taken off Halidol and in fact the doctor agreed, Dr. Lazarica.

Also, when they were ready to send him back, he told them I want to go back to court, I'm ready to go back. So that part doesn't hold true with just a simple understanding of him has a malingerer.

Q So, the point is, though doc, that you can't really tell when someone's a good faker, you can't really tell if they're malingering or if they've partially got a disorder or if they're psychotic, you just can't tell?

A I just did tell, meaning last night when I did my evaluation of him, I found that he is in fact malingering. But that's not a total picture. Yes, he is malingering, yes, he has a serious problem, no it is not schizophrenic.

* * * *

Q So, since you don't know on the continuum of one to [211] a hundred or zero to a hundred where the malingering range ends and this disorder that you now describe for the first time begins, it's really very difficult for you to say how much he is able to understand and assist, versus how much he cannot, is that true?

A I don't think so.

Q Explain that.

A Okay. My description of this disorder for the first time is simply based on that I have the luxury of seeing the course of this man's illness, where Dr. King or Dr. Patterson and Dr. Lazarica, didn't have that luxury. They were just seeing him right at the time.

Now, when it comes to his ineffectiveness to aid counsel, I'm basing that not on the fact that this guy will lie at every turn. Okay? And I'm not saying that he won't.

What I'm saying is that there's a confusion right now that makes it very difficult for anybody who's attempting to get good information back and forth from him and that's what the problem is. That type of confusion is probably linked to this affective disorder, therefore, if we can treat that underlying disorder, hopefully, he'll become less confused and a better person to work with when he works with his attorney.

Q Okay. Now, Doctor, the point is that it's certainly [212] possible isn't it, it's certainly possible that this whole affective disorder that you're seeing in him is because he's really good at malingering?

A No, that's not possible.

* * * *

[213] Q Which affective disorder does he have?

A He has either a form of manic depression or major depression recurrent with psychotic features.

* * * *

[219] Q * * * [W]hat does it mean here when it refers to manic episode under mood disorder? What does that mean?

A Basically, you can have a manic episode where a person typically is not in complete touch with reality. They may, for example, imagine that they're a deer or a fawn dancing in the forest. They may stay up for days and days on end without—they may be aggressive. They [220] may glare at you in a strange sort of way. They may, when they shake your hand, try to, not because they really want to, but almost break it. They have all those things are different parts of somebody when they are mad.

* * * *

Q Well, is he in a manic episode or not?

A No, I don't think he's in a manic episode.

Q What's he in?

A Again, what we're saying is that he has severe enough disorder to be looked at in terms of the more serious problems. Those would be along one of two trees. Either a thought disorder or an affective or mood disorder.

When it comes to precisely what exact diagnosis he fits, I don't have the information to say is this man bipolar or is he showing some major depression recurrent or is he showing what would be psychlothymic?

* * * *

[221] A * * * When you can diagnose somebody as bipolar, one, you have to show that they have a probable family history. It's a genetically determined predisposition. And in those people, Lithium has a very high probability of being effective.

I do not know if he's bipolar or not because I don't have the information. Okay? What I do know is that he is showing the effects of affective loss in his life that is making him at times psychotic as he was, for example, back in August of 1990. He is not schizophrenic.

* * * *

[223] Q How could you say, Doctor, that he honestly is afraid of Mr. Mildfelt when you also clearly say that he's not honest?

A Because some people are situational, in fact, most of us are situational. We may lie in one situation and another situation, we're honest. It's part of human nature.

Q That's true, but how are you capable of judging his credibility based on the short time you spent with him, sir?

A Basically, based upon the testing that I did that found what I had said previously that, yes, he is malingering, yes, he has a major disorder. It is not schizophrenia. [224] Q And that told you he was afraid of Mr. Mildfelt?

A No. What the fear to do with Bob Mildfelt has to do with the connection to Noryb which is a consistent delusional persona that he does fear. It's sort of his God/father * * *.

* * * *

Q Would it affect your opinion about how much of this is malingering and how much of this in an affect or disorder to know that he manipulates prisoners and did otherwise?

A I'm sure he manipulates prisoners and I'm sure he manipulated the people at Eastern State. We're not dealing with an either/or. We're dealing with two things coinciding at the same time.

Q So it wouldn't affect your opinion?

A No.

Q What about the fact that he managed to file himself a couple of pro se federal lawsuits on his own. Would that bother you or make any difference?

[225] A No, it would just tell me that the 50 that he earned on the I.Q. test was obviously bogus, which was the way I decided he obviously was malingering.

Q So, I guess bottom line what you're saying is that, at least the way you call it, he can act normally or has acted normally through a great part of, probably most of his adult life, right?

A I can't say that. Certainly he's had periods of where he's acted normally. I don't know to what proportion.

* * * *

Q * * * When you were talking to all the Defense people and the various investigators, did you ask them if there was other indications through his life that he has a documented history of disorder?

A We went over his history and his history has a lot of evidence of abuse and neglect. To what degree any [226] treatment occurred, I'm unaware of it. He has been incarcerated I think a good amount of his adult life.

* * * *

[235] Q * * * [T]he way I understand your review * * * is that he definitely fits under all the mood disorders or at least he fits somewhere under one of those mood disorders, is that correct?

A That's fair.

Q But, he also fits under the malingering disorder?

A Malingering is not a disorder, it's a V code.

Q Excuse me. The malingering code?

A That's correct. That's correct. That's what I began my testimony with a long time ago.

Q If you've got one of these disorders whenever you're not manifesting any of the symptoms of it, are you incompetent then?

[236] A No, meaning you would have to have presently, at the time, symptoms which are going to be interfering with your mental functioning and that would judge at that moment in time whether somebody is competent or not.

Q So if you would have had the opportunity to see him once a month over the last two years and eight months, from what you understand from his file, you would have expected to find times when he was fine?

A I'd think so.

Q You know, you're a doctor, you see a lot of people like this, you wouldn't have said he was crazy all the time, every time you saw him, based on what you understand.

A Yes, you're right.

Again, let me point out that I'm not even saying he's crazy now. What I am saying is that he lacks the ability to competently confer with his counsel. That's the finding I found.

Q I understand what you said. And it's all affected by how much malingering he's doing as to whether he has the ability or the desire, true?

A No, it's not all affected, meaning that is one factor.

Q That's a factor?

A Yes.

* * * *

[239] REDIRECT EXAMINATION

BY MR. MILDFELT:

* * * *

Q Is there anything inconsistent * * * with your diagnosis here today as to his mental condition that he is malingering in part and that he has a real mental condition?

A There's nothing inconsistent.

Q (By Mr. Mildfelt) The bottom line, Dr. Murphy, do you have an opinion as to whether or not his mental

condition is such that he is unable to communicate with his attorney?

* * * *

A I have the opinion that he is unable at the present time to effectively communicate with his counsel.

* * * *

[240] THE COURT: Doctor, what about the next question that follows the one that Mr. Mildfelt asked you, if he's unable to consult with his attorney and rationally assist in his defense, do you think he can attain competency within a reasonable time provided with a course of treatment, therapy or training?

A Yes, I think that he, and I have to speak in probabilities, but I think probably he would be able to, especially if a regimen of Lithium would be instituted. Lithium is a medication that takes a certain amount of time to get the right blood levels on. That would also be, that would provide diagnostic information. Because if in fact * * * that's his specific problem which I haven't identified, then that would show if he gets better by it, then sure enough, it's nailed, diagnostically.

THE COURT: What would you say in terms of time. Are you talking about a couple of weeks or months?

A Well I think that if there was an aggressive approach and they had the facilities to do the blood levels, I think in terms of maybe a month. I mean if he got a good hit on it and they got those blood levels up [241] there, then hopefully they should be, a month or six weeks, something like that, time frame.

* * * *

[244] CHARLES MOREHEAD

Called as a witness on behalf of the State, after first being duly sworn, testified on his oath as follows; to-wit:

DIRECT EXAMINATION

BY MR. MILLER:

Q State your name, please.
A Charles R. Morehead.

Q Speak up.
A Charles R. Morehead.
Q How do you spell your last name?
A M-o-r-e-h-e-a-d.
Q Where do you work?
A Oklahoma County Jail.
Q How long have you worked there?
A Five months.
Q What division or floor are you assigned to?
A It varies from day today, mostly 12.
Q Mostly 12?
A Yes, sir.
Q Is that the maximum security floor?
A Yes, sir.

[245] Q How long have you worked up there, the whole time, whole five months?

A No, sir, about a quarter of the time.
Q What shift do you work?
A Six to two.
Q In the morning 6:00 to the afternoon two p.m.?
A Yes.
Q And during that time six to two, have you had occasion to interact with inmates on the 12th floor?
A Yes, I have.
Q On more than on occasion?
A Yes.
Q How many days a week do you work?
A Six.
Q During those six days a week that you work, do you ever have an occasion to walk amongst the prisoners on a daily basis?
A Yes, I do.
Q Approximately how many times?
A If I'm working a pod, about 10 times a day.
Q Do you now Byron Cooper?
A Yes, I do.
Q Do you see him in the courtroom today?
A Yes, I do.

Q Where's he at?
[246] A Right there in the corner.
Q What's he got on?
A Orange coveralls.
MR. MILLER: Would the record reflect that he's identified the Defendant, Cooper?
THE COURT: The record should so reflect.
Q (By Mr. Miller) Have you ever had occasion to interact with Mr. Cooper while you were working as a D.O.?
A Yes, I have.
Q How many times do you think, ball park, have you had occasion to work the pod that he is on?
A Twenty.
Q Have you had occasion to have any verbal contact and communication with him in those 20 times that you've worked that pod?
A Yes, I have.
Q On those 20 days that you worked that pod, would you have interacted with the inmates approximately 10 times each day?
A Yes.
Q Have you ever, during the four or five months that you've worked up there, observed Mr. Cooper to act in an unusual way?
A No, I haven't.
[247] Q How would you characterize his activities over the last five months?
A Normal activity.
Q Had you ever interacted with him, talked to him?
A Yes, I have.
Q Did you ever have any difficulty in making him understand what you were saying?
A No, I haven't.
Q Have you ever observed him to talk to someone that was not in the room?
A No, I haven't.
Q Hallucination?
A No.

Q Have you ever seen him balled up like a fetus like he's sitting over in that chair today in court?
A No, I haven't.
Q Never seen that?
A On tv last night on the news.
Q Other than tv last night, have you ever seen him?
A No, I haven't.
Q When's the last time, the very last time that you talked to Byron Cooper?
A Yesterday.
Q When?
A Approximately 6:15 I escorted him downstairs so they [248] could feed him before he went to court.
Q 6:15 a.m.?
A Yes, sir.
Q How do you escort him to court?
A We just walk him to the elevator, take him down to the second floor where he's held until they come to pick him up.
Q And yesterday when you were taking him to court, did you notice him talking to anybody that wasn't there?
A No, I didn't.
Q Did you have any conversation with him?
A One other officer asked him what happened to his hand.
Q Did you hear that?
A Yes, I did.
Q Did Cooper respond?
A Yes, he did.
Q What did he say?
A He said he hurt it and that was all he would say.
Q Did you have to ask him more than once or the other officer have to ask him more than once?
A No, just once.
Q How long did it take Cooper to respond?
A Right away.
Q Any other conversation?
[249] A No.

Q How long were you with Cooper yesterday morning?

A Three to four minutes.

Q And during that three to four minutes you saw no abnormal conduct, is that correct?

A No.

Q All right. What was the time before that you last talked to Cooper?

A The day before that.

Q Sunday?

A I believe.

I believe it was Sunday.

Q And where were you at when you talked to him?

A I walked into 12 B pod where he was in his cell.

Q You went to his cell?

A Yes, I did.

Q Why is that?

A One of the officers said that he would like to talk to me.

Q What was he doing in his cell?

A When I walked over he had bent down to talk to me through the little bean hole in the door.

Q You did not open the door?

A No, I didn't.

Q And what was the conversation at that time?

[250] A He told me that he had been in a fight with an inmate by the last name of Bruner and he said that they had made up and everything was cool. That was about it.

Q Do you know why it was that he wanted to talk to you?

A Because Bruner had been calling, Bruner wanted to be moved and he was telling me that everything was fine between him and Bruner, that they made up.

Q Did he have any difficulty in explaining to you the message he thought he wanted to convey?

A No, no problem.

Q Did you ever talk to him and respond to him from the statements that he made to you?

A Yes, I told him I understand that they made up and I'd see what I could do about moving Inmate Bruner.

Q Or not moving him?

A Right.

Q Any other conversation at that time?

A No.

Q All right. Have you ever seen him rub feces on his head?

A No, I haven't.

Q Have you ever seen him do anything with his toilet like put his hand in it and swish it around and stuff?

A No, I haven't.

[251] Q Have you ever heard anybody talk about it?

A Yes, I did, yesterday.

Q When?

A Some investigators from the Public Defender's Office came up and the other inmates told the investigators that he did that.

Q But you never heard them say that before that day?

A No.

Q Have you ever had inmates come and report odd conduct of other inmates?

A Of other inmates, yes.

Q Is it common, in your opinion, that they would come and report it?

A Yes.

MR. MILDFELT: Your Honor, I object to it.

MR. MILLER: Five months, Judge, working up there.

THE COURT: What others do? I don't know that that is—I guess it might show some kind of course of conduct of the inmates up there.

I'll sustain the objection.

MR. MILLER: That's it.

CROSS EXAMINATION

BY MR. MILDFELT:

Q Officer Morehead, if I understood correctly, about a [252] fourth of your time of that five months has been on the 12th floor, is that correct?
A Yes, sir.
Q Where are you assigned now?
A Today I work the 4th floor.
Q The what floor?
A The 4th.
Q Where did you work yesterday?
A The 12th floor.
Q Okay. The day before that?
A The 12th floor.
Q The day before that?
A I believe the 10th floor.
Q Don't you all usually stay in the control room rather than out on the pod? You all don't spend a whole lot of time out in the pod with the inmates, would that be a fair statement?
A Yes.
MR. MILDFELT: I have nothing further.
THE COURT: Anything further?
MR. MILLER: Next witness, Judge, I'm ready for.

(Witness sworn.)

STEVE CARRELL

Called as a witness on behalf of the State, after first [253] being duly sworn, testified on his oath as follows; to-wit:

DIRECT EXAMINATION

BY MR. MILLER:

Q What's your name, please?
A Steve Carrell.
Q Where do you work?
A Oklahoma County Sheriff's Department.

Q How long have you worked there?
A Since December of '91.
Q Are you over in the new jail now?
A Yes, sir.
Q What floor do you usually work?
A I work all floors.
Q What shift do you usually work?
A Six a.m. to two p.m.
Q Have you ever had occasion to come in contact with Byron Cooper?
A Yes, I have.
Q On more than one occasion?
A Yes, sir.
Q Approximately how many times?
A Six to eight times.
Q Do you see him in the courtroom today?
A Yes, I do.
[254] Q Where's he at?
A Right there.
Q What's he got on today?
A Orange.
MR. MILLER: Would the record reflect he's identified the Defendant, Cooper?
THE COURT: The record should so reflect.
Q Do you see how he's sitting over there today?
A Yes, sir.
Q All balled up like that? Have you ever seen him sit like that before?
A No, I have not.
Q I want to direct your attention to Monday morning, yesterday.
A Yes.
Q Did you have occasion to see him Monday morning?
A Yes I did.
Q What time?
A In between the hours of 6:45 to 7:30.
Q 6:45 to 7:30. Where were you at?
A I was in the same pod as he was.

Q What was the purpose of being there?

A I was watching several inmates that were fixing to eat breakfast before they were transported over to court that morning.

[255] Q Would these be some of the inmates that officers brought down from where they stayed?

A Yes, it would.

Q And was it your job to observe them the whole time they were there?

A Yes, it was.

Q And during this 45 minutes, did you have occasion to observe Mr. Cooper the whole time he was there?

A Yes, I did.

Q What did he do?

A Basically walked around, had a conversation with another inmate, ate, drank coffee.

Q Ate?

A Ate.

Q Breakfast?

A Yes.

Q What did he have, do you remember?

A I believe it was either oatmeal or rice and toast. I'm not sure.

Q Okay. Do you know if he ate it all?

A No, I do not.

Q But you saw him eating at different times?

A The several inmates that I watched, I have to watch each one of them grab a tray, but I did not see him for sure eating at all. I just know he had picked up a tray [256] and took it to his table.

Q And how long did he sit there in front of his tray while he was with the food?

A About 25, 30 minutes.

Q And when did he have the conversation with the other inmate?

A About seven to probably 7:10.

Q Where was he at when he did that?

A Standing by the table that he was eating at.

Q Did they have any difficulties between them?

A No, they did not.

Q Did it appear that Mr. Cooper was talking and understanding what the communication was all about from what you could see?

A Yes, it was.

Q During the 45 minutes that you observed him during breakfast did you ever see him talking off to somebody that wasn't there?

A No, I did not.

Q Did he act out of the ordinary from the six to eight times you've seen him?

A No, sir.

Q In any way?

A No, sir.

Q Have you ever seen him act out of the ordinary?

[257] A No, I have not.

Q If he'd have started talking off to somebody that wasn't there up in the sky or something, what would you have done about it?

A Went over and asked him if there was anything wrong, if he needed some help.

Q And could you have got help for him?

A Yes, I could have.

Q Did you have any conversations with him?

A Yes, I did.

Q Okay. And what was the conversation about?

A I had asked him if he'd gotten into a fight.

He said yes. Talking about why he had moved from pod 12 A to pod 3 B and back to A and then back to B.

Q Did he make sense when he was telling you all this?

A Yes, he did.

Q Did you know what he was talking about?

A Yes.

Q Did you ever have to ask him to repeat himself or explain it?

A No, I did not.

Q Did you ever ask him any questions about it while you were conversing with him?

A Pardon?

[258] Q Well, did you say something like, well, who did you fight or anything like that?

A I asked him who it was but he told me but I cannot remember who it was at this time.

Q Okay. But what I mean, sir, is when you asked him the question about who it was, did he respond to you?

A Yes, he did.

Q Did he appear to know what he was saying when he said it?

A Yes, he did.

Q Did you have to ask him more than once?

A No.

Q Did you ever have to ask him any question more than once?

A No, I did not.

Q How long did that conversation go on?

A Five, 10 minutes.

Q I want to be sure about this now. This was yesterday morning?

A Yesterday morning.

MR. MILLER: Thanks. That's all, Judge.

CROSS EXAMINATION

BY MR. MILDFELT:

Q Officer, how many pepole were down there eating breakfast when you were watching?

[259] A Approximately 16, sir.

Q Was that your job to watch them eat breakfast?

A Yes, it was.

Q Did you have a conversation with all of them?

A No, sir, I did not.

Q Was it just Mr. Cooper you had a conversation with?

A Him and two other residents had asked me questions.

Q And this conversation you had with him lasted five to 10 minutes for him to explain to you or are you just guessing on that?

A Approximately five or 10 minutes.

MR. MILDFELT: Nothing further.

* * * *

[261] [By Mr. Mildfelt]

I got him up in the stand and the closer I would get to him—and I didn't invade his space to the point where he would strike back at me, but I would do it subtly and slowly and I didn't take large leaps or moves. And he watched me so intently with his eyes and I watched his eyes and I don't believe that that man was faking * * *.

Every time I would get close to his space where [262] he is seated in this little witness enclave that is surrounded by these boards that are all nailed together and stained up real pretty that encloses this witness chair, he would stand up and he would get away from me as far as he could and so I would back off and I'd give him a little space. And I would talk to him again and he'd sit down and I'd get close and he'd back up. And whichever way that I would go at him, he would move away from me. And I remember when I went to the north end of the chair and I leaned towards this way, that he started to crawl over this railing onto the court reporter's table.

All that could have been a show. I still backed off. He sat in the chair again. So, I've approached him from every side. I've approached him from all ways this way except I haven't approached him from the front. So yesterday, I approach him from the front. And that's the last thing I did. I regret doing that.

He stood up and he got as far back against the rail behind the witness chair as he could get. I edged closer. He got as far back and he got up on that rail. So I've got him up on the rail and I'm thinking, hey, what can I lose? Let me just see what he does now because he can go no further back, but as the Court knows, there's a

space of about two-and-a-half feet [263] behind this rail and a marble wall.

Without looking for his safety at all and looking what's behind him, when I moved the least bit and I didn't move very far towards him, he fell to get away from me. He fell. He hit his head. The thud on that marble when he jacknifed backward off of that railing into that marble could be heard at the back of that courtroom. * * *

We got him back up here in the witness enclave, he's just busted his head, tears are streaming down his eyes and he does not respond in any normal fashion. He starts talking that Noryb is going to be mad at him. That Noryb is going to angry with him. And he was crying and that wasn't faking. And I don't think anybody in the courtroom, Marlon Brando in his finest hour could not have faked that under that kind of pain and that kind of trauma, it cannot be done. And he was not responsive to the situation. He should have been mad at me, he should have been mad at you, he should have been mad at the deputies. Instead, he's afraid because he has this fear that Noryb's going to be angry with him. * * *

[264] * * * Dr. Murphy says, yeah, a lot of him is malingering but there's one thing he's not malingering. He has a mental condition and that mental condition—and first of all, he says he is genuinely, Byron Keith Cooper is genuinely afraid of me, which makes me sad because I am his lawyer. I am his chief trial counsel and he is genuinely afraid of me.

But I asked the doctor, bottom line, can he communicate with his attorney? He cannot. Is it treatable? It is. That is the question that the Court has to decide.

Based on that evidence, I don't think there's any question but that there is a doubt as to his present competency. It can be cured and it can be treated, but it does exist, Your Honor.

MR. MILLER: It probably won't surprise the Court that I don't think that there is any doubt but that he's competent. But I think we're past the doubts or no [265]

doubts stage. When I read 1175.3 and 1175.4, we've already had the doctor look at him. The Court ordered it. We've already had a doctor testify about the five factors that the doctor's supposed to examine the Defendant for. The first two being the most important, whether he's able to appreciate the charges, whether or not he is able to consult his lawyer. That's done and the doctor says kind of a hodgepodge of things, but the bottom line, we know he's a malingerer and that some vague affect or mood disorder, he says, is present.

Judge, the next step once you have the doctor's testimony about that is 1175.4. And it says that it's the Defendant's burden to come forward with clear and convincing evidence that a person is incompetent. More importantly, Judge, it says a person shall be presumed to be competent. Presumed competent, Judge. And what do we have to support that presumption and refute any evidence that he is clearly and convincingly incompetent?

Number one, the doctor, while he was resolved that no matter what else he said he was going to stick in there some disorder from the D.S.M. III.

First, it was manic depressive and then it was manic depressive and this other deal, major depressed disorder and then it was everything under the mood disorder category and then maybe it was all those things [266] plus P.T.S.D., Post Traumatic Stress Disorder. Those are the different or ranging variations that the doctor presented us as far as possible disorders, because he doesn't know.

All he does know for sure and the only other thing he was resolved about and as is clearly defined in D.S.M. III-R as the mood disorder is that this man is a malingerer. He's a classic example of one. He lies. He's faking everybody out. The doctor said specifically that all that stuff that he heard from the jail that the Defendant supposedly did and I don't know whether he did it or not, but all that was a bunch of faking. It was

aspects of the malingering is what the doctor called it. He didn't put anything into any of that.

Next he said that he was malingering on part of the diagnostic testing. Next he said that this business in court the last two days, that's malingering. It's an aspect of malingering, he used the term, the same term. In other words, that's not part of this disorder that we've heard so much or so little about, actually.

And finally, he concedes that three other doctors, two of whom who saw Cooper for three whole months, for at least certain parts of the time that they saw him, thought he was schizophrenic but they're wrong.

Then they thought he was a malingerer, but [267] they're wrong. Because he is a malingerer with an affect disorder. Who's right, Judge? Has he established or have they have established by clear and convincing evidence that he's right?

Here's how we've shown he's not. The doctor said that if he was really under the effect or the symptoms of an affect disorder, mood disorder then he couldn't just snap in and out. He would specifically not expect Cooper to be okay the morning before court yesterday, specifically. That he was bad last week, okay yesterday morning and then bad when he crossed the threshold here in the courtroom.

But that's exactly what we've shown you he did. We've got officers who have been up there with him for four or five months as the first officer yesterday. He said he'd never seen anything like this business, never heard anything about any of this business. He's talked to Cooper many times. There was never a problem.

As recently as April 15th, Cooper coherently talked about his testimony in another criminal case in a courtroom. Whether he would lie or not. Since that time he's written you this letter. The doctor said that was—told me out in the hall it was a bunch of bull but in court he said it was an aspect of malingering again.

On the day of Court, Judge, he's brought down [268] by one officer. There's a conversation about his injuries, he's coherent. There's none of this talking off or spouting off. The next officer, he's sitting at the table, probably eating his breakfast, definitely with his breakfast, 45 minutes, five to 10 of which he has a coherent, somewhat lengthy involved conversation about different pods and being moved and not being moved and the officer understood all of it and Cooper never had any difficulty with him.

That is a wholly different person than the individual who would answer questions that were not too difficult for him yesterday that he did not feel like he'd be trapped in, and the person that upon being posed very difficult questions, just like when he talked to the doctor last night, he just sat there quietly. All balled up. He's faking. That's the way it looks to me.

Now, I know it's been a few weeks ago since he's filed these, but I think it's pretty telling about his intelligence and his ability to run a game on all of us and to cause this hearing for the last day and a half when you look at those lawsuits. We can't prove yet, and maybe before it's over, I'll be able to. We can't prove yet that he wrote every word of the lawsuit, but we know he signed under a certification, he admits he can read that says he had read them and all facts are true and [269] correct. And he put his name and his name is several places throughout that lawsuit. He did it twice, once in October and once in January.

And then as recently as a week or two weeks ago, Mr. Nolan serves him some papers up in the jail and Cooper knows exactly what they're all about. Doesn't ask a question about them, he just starts reading them.

There's nothing consistent about this, Judge, except that when he gets in the courtroom, he's a faker. He doesn't want to pay the piper here. He doesn't want to run the risk of the jury trial. I say after two years and eight months, after already being looked at by this doctor

and all the testimony you've heard, they have not shown by clear and convincing evidence under 1175.4 that he is incompetent.

MR. MILDFELT: Your Honor, may I briefly respond?

THE COURT: Sure.

MR. MILDFELT: And it will be very brief.

Apparently, Mr. Miller doesn't think you can be a malingerer and have this disorder. That is incorrect, according to the doctor. If you will remember last Wednesday I said, not once but I think twice, two of my investigators have a doubt as to his competency. We will pay for it. Mr. Miller can pick the psychiatrist or the [270] doctor. He chose not to. We picked a doctor on short notice yesterday because we were set for trial and now he faults the doctor's findings.

Those are the doctor's findings. He's a qualified doctor. He's given his sworn testimony here. His sworn testimony is that this man cannot communicate with his lawyer. We have met our burden of proof. * * *

[271] THE COURT: Well, it looks to me like 1175.4, A, paragraph B says, "The court at the hearing on the application—", which is what we just completed, "shall determine by clear and convincing evidence if the person is incompetent. The person shall be presumed to be competent for the purpose of the allocation of the burden of proof and burden of going forward with the evidence."

Well, I think I've used the expression, I know I've talked to Mr. Mildfelt and said in the past that normal is like us. Anybody that's not like us is not normal, so I don't think normal is a proper definition that we are to use with incompetence. My shirtsleeve opinion of Mr. Cooper is that he's not normal. Now, to say he's not competent is something else.

I respect Dr. Murphy and I don't dispute Dr. Murphy's diagnosis. He examined Mr. Cooper under adverse circumstances and hastily and has seen just a limited ex-

posure to Mr. Cooper. I don't fault him for that. From what he observed, he's probably accurate.

But you know, all things considered, I suppose it's possible for a client to be in such a predicament that he can't help his defense and still not be incompetent. I suppose that's a possibility, too.

I think it's going to take smarter people than [272] me to make a decision here. I'm going to say that I don't believe he has carried the burden by clear and convincing evidence of his incompetency and I'm going to say we're going to go to trial.

DISTRICT COURT OF OKLAHOMA COUNTY

(Title Omitted in Printing)

TRANSCRIPTS OF JURY TRIAL PROCEEDINGS HAD ON MAY 5-22, 1992

[The following record was made at the bench on May 5, Vol. I, page 9.]

MR. MILDFELT: And the Court knows he's sitting over there in the corner. He's not going to be sitting next to me. He will not allow me within about two-and-a-half to three feet of him. I think that's probably about the closest I could get to him yesterday or last Wednesday before he would shy away and back from me.

The Court, if the Court so orders me, I'm going to be trying a case with a man that I can't even get close to, and yet, I have got to be able to turn to him and ask him questions when witnesses testify. And I can't do that. Number 1, he can't communicate to me. Number 2, I can't get close to it and there's a medical [10] basis for that. And so I'm not ready.

[The following exchange took place at the bench during voir dire of the jury on May 5, Vol. I, pages 120-122.]

THE COURT: What did you want to say Ms. Ervin?

PROSPECTIVE JUROR ERVIN: Well, I just feel that I think he comes across to me as just creepy.

THE COURT: As what?

PROSPECTIVE JUROR ERVIN: Creepy. That's all I can say.

THE COURT: Oh, well, yeah, but you know about judging the book by the cover, don't you?

PROSPECTIVE JUROR ERVIN: I know that. But—

THE COURT: You know, it would probably be appropriate in a lot of cases for the Defendant not to even be present where you wouldn't even look at him, and [121] you make a decision based on the evidence without ever seeing the fellow.

PROSPECTIVE JUROR ERVIN: I understand that. I just feel like I couldn't be fair.

* * * *

THE COURT: * * * He does look creepy, but we're not going to find him guilty because he looks creepy. * * * Are you saying, though, that you're leaning toward guilty just because of his appearance and the charge that he's got against him?

PROSPECTIVE JUROR ERVIN: Right.

[122] THE COURT: Are you leaning that way so that you don't think you can be fair about the case?

PROSPECTIVE JUROR ERVIN: Yeah.

* * * *

MR. MILLER: Ms. Ervin, you said earlier that you understand that all Defendants are presumed innocent?

PROSPECTIVE JUROR ERVIN: Right. I understand that.

MR. MILLER: And I think you said that you would be willing to look at the case that way basically. Is that true?

PROSPECTIVE JUROR ERVIN: Right.

MR. MILLER: Have you changed your mind or * * * are you still ready to do that?

PROSPECTIVE JUROR ERVIN: I don't think I could do that.

* * * *

THE COURT: I'll excuse you, Ms. Ervin.

[The following excerpts are from voir dire of the jury on May 6, Vol. II.]

[144] MR. MILDFELT: * * * That's my client. Has everybody noticed he's dressed in orange? * * * And

would you notice that he is not participating in the proceedings? * * * And do you agree his hair is sticking out like this?

* * * *

[145] MR. MILDFELT: * * * It would be a fair statement you're able to see him, and he's dressed in orange jail uniforms, he's seated over there in a chair about five feet from me, and he has his head down and he looks like he's taking a nap. Is that a fair assessment of the description I've given of my client?

PROSPECTIVE JUROR JENNINGS: That's my impression.

[147] PROSPECTIVE JUROR DENTON: Just from his body language and the way he appears withdrawn from everything that's going on in here, he could either be guilty or he could be depressed or he could be tired.

[The following excerpt is from cross-examination of State's witness Sidney Asher on May 11, Vol. V, page 75.]

Q Twice as big as this guy sitting over there in the fetal position. Is that right?

A That's right.

[The following discussion took place at the bench on May 12, Vol. VI, page 132.]

THE COURT: Mr. Ravitz, do you want to make a record on something?

MR. RAVITZ: Yes, sir, Judge. * * * First of all, just for the record Mr. Cooper is still dressed out in orange coveralls sitting in the back * * *. He, from time to time, talks in a very loud voice. It's obvious that the jury can, in fact, hear him, though he has not been disruptive. But I don't think anybody can hear what, exactly, he's saying. I can't and I'm closer to him. He does not seem to be paying any attention to the trial and, from time to time, sits in a fetal position.

[The following discussion took place at the bench on May 14, Vol. VIII, pages 135-144.]

DEPUTY WILLIAM GRIMSLEY: * * * Deputy Albertson asked me what he had in his hand. I said it looks like candy, which he had access to through commissary in the jail. And there's a real heavy odor of feces in the area. And I look at it close, and it doesn't look like candy.

THE COURT: Do you think it's feces?

DEPUTY WILLIAM GRIMSLEY: Yes, sir, I do.

MR. MILDFELT: I'd tell the Court that it is. I smelled something, but I thought it was just bad breath, or something, and I thought, boy it's pretty [135] strong, but I did not say anything about it. I just didn't know that my client was over there * * * eating feces.

MR. MILLER: Well, now, did anybody see him eat it?

MR. MILDFELT: Apparently the bailiff did.

DEPUTY WILLIAM GRIMSLEY: Both of us did, Your Honor.

MR. RAVITZ: * * * Again, Judge, for the record, * * * it's our contention that Mr. Cooper is incompetent, that he does not understand the proceedings against him.

MR. MILDFELT: And he's babbling over there right now as we're speaking and has been continually.

MR. RAVITZ: He's been babbling off and on, and sitting in a fetal position. Again, it's our contention that the Court used the wrong standard in deciding competency. And again, we'd ask the Court to discontinue the trial and commit Mr. Cooper to a mental hospital.

* * * *

[137] THE COURT: Let the record reflect that Mr. Cooper was taken upstairs by the deputies at my request, * * * and now they are returning to the [138] courtroom. And * * * what do you have to tell us?

DEPUTY GRIMSLEY: We took Mr. Cooper upstairs, put on a pair of rubber gloves, extracted the material from his hand, and I smelled it and it had the definite oder of human feces to it, at which time I placed

it into a rubber glove, tied a knot in it, and placed it in a paper bag. * * *

MR. RAVITZ: And in your opinion, that is what he was eating?

DEPUTY GRIMSLEY: That is correct, sir.

MR. RAVITZ: You have no doubt about that?

[139] DEPUTY GRIMSLEY: No doubt.

MR. RAVITZ: Okay. And subsequent to that he, evidently voluntarily threw up. Is that correct—or involuntarily threw up. It wasn't of his own accord. Is that correct?

DEPUTY GRIMSLEY: Upstairs, yes, he did, sir.

* * * *

[141] MR. MILDFELT: Did you tell him to wash his hands an [sic] clean up when you took him upstairs? * * *

DEPUTY ALBERTSON: I told him to get cleaned up.

MR. RAVITZ: Judge, again, we would move for a mistrial. We do not believe Mr. Cooper is competent to aid and assist us. If the Court remembers the testimony of Dr. Murphy, stress can cause this type of situation. * * * [142] We would ask the Court to continue this matter if they're not willing to grant a mistrial and appoint an independent expert to advise the Court as to the competency of Mr. Cooper. * * *

MR. MILDFELT: And, Judge, I think the record should be clear that since this trial has started Mr. Cooper has never spoken to me. I have attempted to speak to him because the doctor testified last week that he was scared of me. I couldn't communicate with him. To my knowledge, he hasn't spoken to Mr. Ravitz, either. And that's two weeks of trial tomorrow.

MR. RAVITZ: That is correct, Judge.

* * * *

[144] THE COURT: Well, of course, I heard all that testimony and evidence and I don't claim any special knowledge, you know, of psychology or psychiatry. I just have to do the best I can with the tools I've got to work with. I'll overrule your motion. We'll go ahead and go on to the end of this thing.

MR. RAVITZ: We move for a mistrial based on the Court's ruling.

THE COURT: Overruled.

COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. F-92-533

BYRON KEITH COOPER,
Appellant,
v.
THE STATE OF OKLAHOMA,
Appellee.

Jan. 10, 1995

Rehearing Denied Feb. 13, 1995

An Appeal from the District Court of Oklahoma County; Richard J. Freeman, District Judge.

Byron Keith Cooper, Appellant, was tried by jury and convicted of Murder in the First Degree (21 O.S.Supp. 1982, § 701.7(A)) in Case No. CRF-89-5084-7, in the District Court of Oklahoma County. The jury found the existence of five aggravating circumstances and recommended punishment of death. The trial court sentenced accordingly. From these judgments and sentences Appellant has perfected this appeal. The Judgment and sentence for First Degree Murder is AFFIRMED.

OPINION

LUMPKIN, Presiding Judge:

Appellant Byron Keith Cooper was tried by jury and convicted of Murder in the First Degree (21 O.S.Supp. 1989, § 701.7) in the District Court of Oklahoma County, Case No. CF-89-5084. The jury found the existence of five (5) aggravating circumstances (Appellant was

previously convicted of a felony involving the use or threat of violence; the murder was especially heinous, atrocious and cruel; the murder was committed to avoid arrest or prosecution; the murder was committed while Appellant was serving a sentence for a conviction of a felony; and Appellant posed a continuing threat to society) and recommended punishment of death. The trial court sentenced accordingly. From this judgment and sentence Appellant has perfected this appeal. We affirm.[1]

I. FACTS

Eighty-six-year-old Harold Sheppard was found dead in his home at Northeast 13th and Fonshill streets by a friend who was helping him with plans to renovate his home. The victim's wife had died years earlier and his daughter lived in another state. Mr. Sheppard lived only with his little dog, which authorities found protecting the victim's body. He was found on September 8, 1989; based on interviews with people in the neighborhood, authorities estimate he died on September 4, after being stabbed to death that same evening.

A former cocaine dealer who sold drugs in the area frequented by Appellant witnessed Appellant's arrest by detectives on September 19. The dealer testified that a week or two before the arrest, Appellant had approached him, showed him a credit card with someone else's name on it, and offered to purchase merchandise in exchange for cocaine. The dealer could not remember the name on the credit card, but remembered the first name started with "H." The dealer initially refused; but after Appellant persisted, said he could use a watch. A short time later that same day, Appellant returned with a gold Seiko watch. An acquaintance who happened to be present

[1] In so doing, we note the following: this case was filed December 7, 1992; it was fully briefed and at issue April 4, 1994; and it was submitted to this Court on May 4, 1994.

during the exchange said he wanted a watch, too. Appellant told him he would get him one.

On September 5, the day after Mr. Sheppard was killed, Appellant used Mr. Sheppard's J.C. Penney credit card to purchase watches. One watch, a goal Seiko, was bought at the J.C. Penney store in Shepherd Mall; the other at the Penney store in Crossroads Mall. Both were purchased the same day. Authorities became aware of the purchases less than two weeks later, when the victim's daughter received the bill for the purchases. The clerk at the Shepherd Mall store remembered the purchase at her store. In fact, she was suspicious because Appellant did not look like the kind of customer to whom Penney would issue a credit card. She attempted to call Harold Sheppard, the name on the card, during the remainder of the week; no one ever answered the telephone. She later gave authorities Appellant's description and a composite drawing, which was distributed to law enforcement personnel.

On September 19, detectives spotted Appellant in the vicinity of Northeast 4th and Laird. When they turned their car around to investigate further, Appellant began running from them. When he was apprehended a short time later, he was carrying a portion of a car antenna commonly used as a pipe to smoke crack cocaine.

Appellant was questioned by authorities for several hours. During the interrogation, Appellant admitted murdering not only Harold Sheppard, but also Monteen Warner, whose body was discovered on September 17, 1989 at her home at 1021 Northeast 6th Street (evidence of the Warner homicide was not presented until the second stage). However, Appellant also retracted the admissions, and denied being inside either residence. Appellant denied being involved in a murder at 13th and Fonshill, despite the fact detectives had not told him Mr. Sheppard's house was located at that intersection and despite the fact Appellant told the detectives he had not

heard anything about the murders in the news media. Toward the end of the interview, Appellant conceded he may have committed the murders, but could not remember.

Appellant had been staying with Walter Sam Ray, a man he met in prison. At that apartment, authorities found two box-type cameras which Mr. Sheppard's daughter identified as belonging to her father. Also found at the apartment was a watch which had belonged to Mr. Sheppard. Using chemical reagents, technical investigators discovered traces of blood on a shoe, sock and blue jeans, all belonging to Appellant and all found in a box of Appellant's belongings in Ray's apartment. Two hairs which were microscopically consistent with Mr. Sheppard were also found on one of Appellant's shoes found at the apartment.

At Mr. Sheppard's house, authorities found Appellant's fingerprints on a flashlight, a metal can, a watch case, and a carton of Salem cigarettes, the brand Mr. Sheppard smoked. Appellant's prints were also found on the charge receipt he signed at the Sheppherd Mall J.C. Penney store. Authorities found a Viceroy brand cigarette butt on the kitchen floor. Appellant had a pack of Viceroy brand cigarettes when he was apprehended. Appellant is a non-secretor, meaning his blood type cannot be discovered in other bodily fluids such as saliva. No blood type could be detected from the Viceroy cigarette butt, indicating that if saliva were left on it, the person who did so could be a non-secretor.

Appellant in the police interview could not explain how his fingerprints could have been placed on the items in Mr. Sheppard's house. However, he did say if he had killed the man, his prints should have been found on the weapon, and he was certain they would not be. Authorities found a butcher knife in the draining board in the victim's kitchen. No prints were found on the knife, and there was no visible blood; however, when a chemical

reagent was sprayed on the knife, the blade exhibited swipe marks which would be exhibited if blood on the blade had been wiped off.

II. PRE-TRIAL ISSUES

A.

For his first proposition, Appellant complains the authority used to determine competency is unconstitutional. A sizeable portion of pretrial proceedings focused on Appellant's competency. His attorneys complained he would not communicate with them and that he thought his lead attorney was a devil who wanted him dead. A non-jury competency hearing was afforded Appellant in December 1990 and January 1991 pursuant to sections 1175.1 through 1175.8 of Title 22, at the conclusion of which Appellant was adjudged competent to stand trial.

Appellant acknowledges a hearing was held, but complains the presumption of competency, combined with the requirement he show incompetency by "clear and convincing" evidence, 22 O.S.Supp.1985, § 1175.4(B), is such a harsh standard it is violative of his right to Due Process of Law. He argues the standard of proof on him should have been preponderance of the evidence.

It is a basic precept that statutes are presumed to be constitutional and the person alleging their unconstitutionality has the burden of proof. *Newton v. State*, 824 P.2d 391, 396 (Okl.Cr.1991); *State v. Hunter*, 787 P.2d 864, 865 (Okl.Cr.1990); *Nunley v. State*, 660 P.2d 1052, 1056 (Okl.Cr.1983), *cert. denied*, 464 U.S. 867, 104 S.Ct. 205, 78 L.Ed.2d 179 (1983).

The statutory reference to "competency" covers two requirements: a defendant must have sufficient ability to consult with an attorney; and the defendant must be able to understand the nature of the charges and proceedings being brought against him. 22 O.S.1981, § 1175.1. The question of a defendant's competency can be raised by the

defendant, his attorney, the prosecutor or even the court; however, it must state facts "sufficient to raise a doubt" in the court's mind of the defendant's competency. Any such application and sufficient notice must be provided the defendant and must contain certain facts and rights. 22 O.S.Supp.1983, § 1175.2. Once such an application is filed, the court must hold a hearing to examine the application. The court may also entertain other evidence pertinent to the question at that hearing. A court finding merit to the application must order an examination by doctors or appropriate technicans, who shall examine the defendant and determine if he can appreciate the nature of the charges; if he is capable of assisting his attorney; and other questions concerning the attainment of competency (if incompetent), whether the defendant is mentally ill, and whether he poses a threat to himself or others if released without treatment. 22 O.S.Supp.1990, § 1175.3. Following an initial determination by doctors or technicians and upon application, the court is required to hold a hearing on the competency issue. At that hearing, the defendant is presumed competent, and must prove by clear and convincing evidence he is incompetent. 22 O.S.Supp.1985, § 1175.4.

Medina v. California, 505 U.S. ——, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) is dispositive of Appellant's argument he cannot be presumed competent. *Id.* at ——, 112 S.Ct. at 2575, 120 L.Ed.2d at 363 ("Based on our review of the historical treatment of the burden of proof in competency proceedings, the operation of the challenged rule, and our precedents, we cannot say that the allocation of the burden of proof to a criminal defendant to prove incompetence 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (quoting *Patterson v. New York*, 432 U.S. 197, 202, 97 S.Ct. 2319, 2322, 53 L.Ed.2d 281 (1977)).

In *Medina*, the criminal defendant bore the burden of proving his incompetency by a preponderance of the evi-

dence. Oklahoma law requires he prove his incompetency by clear and convincing evidence. To determine whether this offends notions of Due Process requires some discussion of allocation of proof and fundamental concepts of Due Process.

Exactly what "due process" is has never been satisfactorily defined. This Court has stated it is "older than written Constitutions," and the phrase "is synonymous with 'law of the land' as found in Magna Carta." It then concluded the phrase "intended the general law which reads before it condemns, which proceeds upon inquiry and renders judgment only after trial. It means that every citizen shall hold his life, liberty, and property under the protection of the general rules which govern society." *Ex Parte Hollins*, 54 Okl.Cr. 70, 75, 14 P.2d 243 (1932); *see also Dartmouth College v. Woodward*, 4 Wheat. 519, 4 L.Ed. 629, 645 (1819) (same). This Court has also defined it as a provision intended "to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with, or suspected of, crime by those holding positions of favor and authority." *Lyons v. State*, 77 Okl.Cr. 197, 232, 138 P.2d 142 (1943), *aff'd*, 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481 (1944), *overruled on other grounds, Hopper v. State*, 736 P.2d 538, 540 (Okl.Cr.1987). The law is "due process" when it operates on all alike during the regular course of its administration through the courts, and does not subject one to the arbitrary exercise of the powers of government. *Shaw v. State*, 76 Okl.Cr. 271, 134 P.2d 999 (1943) (syllabus); *see also Ward v. State*, 444 P.2d 255 (Okl.Cr.1968), *cert. denied*, 393 U.S. 1040, 89 S.Ct. 665, 21 L.Ed.2d 588 (1969) (Requirements of due process are met if a criminal trial is held according to a settled course of judicial proceedings).

Perhaps the best exposition on the characteristics of due process occurred in an 1878 New York case, where the writer said:

> It is difficult to define with precision the exact meaning and scope of the phrase "due process of law." Any definition which could be given, would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by Mr. Justice Miller of the United States Supreme Court, to leave the meaning to be evolved "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." (*Davidson v. Board of Administrators of New Orleans*, 17 Albany Law Journal, 223) It may however be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard, is absolutely essential. We cannot conceive of due process without this. In his argument in the *Dartmouth College case* (4 Wheat., 519, 4 L.Ed. 629), Webster defined "due process of law" as a proceeding "which proceeds upon inquiry and renders judgment only after trial." Mr. Justice Edwards in *Westervelt v. Gregg* (12 N.Y. 209) defines it as follows: "Due process of law undoubtedly means in due course of legal proceedings according to those rules and forms which have been established for the protection of private rights." . . . .; and if found to be suitable or admissible in a special case it will be adjudged to be "due process of law," but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law.

Stuart v. Palmer, 74 N.Y. 183, 191, 194 (1878); *see also Brown v. Board of Levee Com'rs*, 50 Miss. 468, 478-79 (1874) whether written *"per legale judicium pariu, suorum, rel per legem terrae"* as found in the Magna Carta; "by the law of the land, or the judgment of his peers"; "due process of law"; "due course of law"; or

"according to the law of the land," all have the same general interpretation); *Westervelt v. Gregg*, 12 N.Y. 202, 209 (1854).

However, the term also denotes more than simply the law of the land or the law as it was at the time the constitution took effect:

> . . . . For that would seem to deny to the legislature the power to alter, change, or amend the law. Yet we know that it is every day's practice for the law-making department of the government to repeal old laws, enact new, and change remedies.
>
> The principle does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue.
>
> It refers to certain fundamental rights which that system of justice, of which ours is a derivative, has always recognized. If any of these are disregarded, in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by "due course of law."

Brown, 50 Miss. at 479.

One thing is clear: whatever Due Process is, it is not a wide-open, catch-all provision to be used by every defendant who loses a pretrial motion or by any appellate court that may not agree with the trial court results. As the Supreme Court has observed: "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate 'fundamental fairness' very narrowly." *Medina*, 505 U.S. at ——, 112 S.Ct. at 2576, 120 L.Ed.2d at 362 (quoting *Dowling v. United States*, 493 U.S. 342, 352, 110 S.Ct. 668, 674, 107 L.Ed.2d 708 (1990)). Indeed, as the *Medina* court continued:

> The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order. As we said in *Spencer v. Texas*, 385 U.S. 554, 564, 87 S.Ct. 648, 653, 17 L.Ed.2d 606 (1967), "it has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." Accord, *Estelle v. McGuire*, 502 U.S. 62, ——, 112 S.Ct. 475, 481, 116 L.Ed.2d 385 (1991); *Marshall v. Lonberger*, 459 U.S. 422, 438, n. 6, 103 S.Ct. 843, 853, n. 6, 74 L.Ed.2d 646 (1983).

Medina, 505 U.S. at ——, 112 S.Ct. 2576, 120 L.Ed.2d at 362.

From this, we can gather that, however due process is defined, it is satisfied if a defendant has notice [2] and a right to be heard at a public proceeding at which all constitutional and statutory provisions are observed according to those rules and forms which have been established for the protection of private rights, in such a way that it operates on all alike. With those principles in mind, we now turn to the standard of proof a criminal defendant in Oklahoma must bear to prove his incompetence.

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type

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[2] Appellant does not raise a lack of notice in connection with any of these proceedings; accordingly, we do not discuss this requirement of Due Process.

of adjudication." *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (quoting *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring)). The *Addington* Court further observed the standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

It seems clear the "preponderance-of-the-evidence" standard is generally used in civil proceedings, *e.g.*, matters involving monetary disputes, etc., because society has a minimal concern with the outcome of such private suits. It therefore makes sense that litigants "share the risk of error in roughly equal fashion." *Id.*

But in criminal cases, the interests of the defendant are of such magnitude that they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In other words, "[i]n the administration of criminal justice, our society imposes almost the entire risk of error upon itself, by requiring the State to prove the guilt of an accused beyond a reasonable doubt." *Id.*, 441 U.S. at 423-24, 99 S.Ct. at 1807.

At issue here is the intermediate standard, which our Legislature has termed "clear and convincing." In using this standard our Legislature has determined the interests at stake in this area are more substantial than other civil proceedings (which a competency hearing has been determined to be, *see Miller v. State*, 751 P.2d 733, 737-38 (Okl.Cr.1988)).

The standard of proof used "is more than an empty semantic exercise." *Addington*, 441 U.S. at 425, 99 S.Ct. at 1809 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir.1971) (Sobeloff, J., concurring in part and dissenting in part), *cert. dismissed sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355, 92 S.Ct.

2091, 32 L.Ed.2d 791 (1972)). By placing a certain standard on a certain party, it gives courts an indication of "the value society places on individual liberty." *Id.*

This Court, in considering what standard should govern in a present competency proceeding, must assess the presumption of competency together with the extent of the defendant's interest in not being tried while incompetent and the State's interest in being assured a defendant is not merely attempting to escape prosecution by feigning incompetence in a field where "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations." *Medina*, 505 U.S. at ——, 112 S.Ct. at 2580, 120 L.Ed.2d at 367; *Addington*, 441 U.S. at 430, 99 S.Ct. at 1811-12.

Appellant's case in an excellent example of why our Legislature set the standard of proof so high. His attorneys first informed the trial court they were concerned about his competency because he refused to communicate with them, seeing them as evil forces seeking his death. However, even his own experts admitted the possibility Appellant was malingering. The State's expert, relying on inconsistent answers given to various health care personnel at Eastern State Hospital, Appellant's record, and observations of Appellant himself, concluded Appellant was competent. In the second hearing, held just before trial started, evidence indicated Appellant acted normally in other criminal proceedings and in situations which did not involve the murders. Even his own psychologist admitted one health care professional at Eastern State had labeled him a "world-class, first-class manipulator"; and was of the opinion Appellant both had an affective disorder and was malingering (although he was of the opinion it was the affective disorder, and not the malingering, which prevented Appellant from communicating with his attorneys).

We list these facts here not to determine at this juncture whether Appellant was in fact mentally ill, whether

he was malingering, or both; but to illustrate the inexactness and uncertainty attached to proceedings of this nature, proceedings based on diagnoses which are "to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician." *Medina*, 505 U.S. at ——, 112 S.Ct. at 2580, 120 L.Ed.2d at 367 (quoting *Addington*, 441 U.S. at 430, 99 S.Ct. at 1811-12). The State has great interest in assuring its citizens a thorough and speedy judicial process, together with the presumption of competency which is historically based on our law. A truly incompetent criminal defendant, through his attorneys and experts, can prove incompetency with relative ease. Therefore, we find forcing a criminal defendant to prove by clear and convincing evidence he is incompetent is not subject to proscription under the Due Process Clause, because it does not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 505 U.S. at ——, 112 S.Ct. at 2577, 120 L.Ed.2d at 363 (quoting *Patterson*, 432 U.S. at 202, 97 S.Ct. at 2322-23).

We therefore reject Appellant's first proposition of error.

B.

We now turn to Appellant's third proposition, whether Appellant presented sufficient evidence to show he was incompetent.

Appellant had two competency hearings: one in late December 1990 and early January 1991; and the second at the start of his trial, May 1992. Appellant now complains both rulings were incorrect.

This Court has held there are two questions which must be addressed in determining present competency. First. we look at whether the defendant was able to understand the nature of the charges and proceedings brought against him; and second, whether the defendant

had the ability effectively and rationally to assist in his defense. *Smith v. State*, 819 P.2d 270, 273-74 (Okl.Cr. 1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 2312, 119 L.Ed.2d 232 (1992). As we discussed above, a defendant is presumed competent, and must prove otherwise by clear and convincing evidence. 22 O.S.Supp. 1985, § 1175.4

The first hearing presents no real problem. At that hearing, Dr. Edith King testified Appellant was clearly incompetent before he was sent to Vinita. She gave as examples Appellant seemed very vague concerning his charge and became agitated when asked about the murder charge; he had difficulty focusing on any subject for very long; he did not appear to know what would happen to him if he were convicted, saying he would probably get to go home. Dr. King opined Appellant displayed a thought disorder, with possible auditory and visual hallucinations. However, she thought he could be treated. She admitted the possibility Appellant was malingering, and testified that he seemed more in touch with reality the day of the hearing. However, she could not say he was competent the day of the hearing. On the other hand, Dr. Jeanne Russell testified she conducted the screening interview with Appellant when he entered Eastern State Hospital. At that time, he denied knowing the charges against him, his birthdate, or what his attorney's role was. She also reviewed his hospital record, talked with the staff, and contacted the Department of Corrections concerning previous mental history. She also observed him herself. She did not think Appellant's answers were consistent with answers given other staff members, who recorded some of his statements in his record. In those records, there were at least four occasions recorded where he expressed an understanding of courtroom procedure, knew what the charges against him were, and was aware of the consequences of a conviction. The records also showed Appellant expressed an interest in a plea of not guilty by reason of insanity, indicating he had

some knowledge of a possible defense. On one occasion, Appellant was reported to have said: "[y]ou're wasting your time going over courtroom proceedings with me. I know them. I've already spent 10 calendar years behind bars." On another occasion, a notation stated Appellant "won't discuss charges with staff. No reservations in talking with peers," and reportedly said "I've got nothing to lose, I've already got two murder raps on me." [3]

Based on this evidence, we do not find error in the trial court's ruling Appellant was competent.

At the second post-examination competency hearing,[4] Appellant's evidence was stronger. Defense counsel presented inmates from Appellant's jail pod who testified as to Appellant's strange behavior; he compulsively and continually cleaned his cell; played with his feces, smearing it on his face; and talked to himself or to thin air. Dr. Philip Murphy agreed with the comment of a nurse at Eastern State who labeled Appellant a "world-class, first-class manipulator"; however, the psychologist also testified Appellant suffered from major affective (*i.e.*, mood) disorder, which was a form of mental illness. The disorder was episodic in form, meaning it would wax and wane on its own, which made treatment difficult; however, it was treatable. And although Appellant was a malingerer, it was the mental illness which kept him from communicating with his counsel. Therefore, Appellant was not competent.

[3] Appellant argues on appeal Dr. Russell was not a credible witness, as she was not on Appellant's psychiatric team at Eastern State and had never had any significant personal contact with him. We find this unpersuasive. *See Johnson v. State*, 761 P.2d 484, 492 (Okl.Cr.1988) (psychiatrists who were responsible for evaluating Appellant almost five years earlier were dead at time case remanded for post-evaluation competency hearing; however, medical records were still intact and a doctor on staff at Eastern State Hospital testified regarding the information in appellant's record. Court did not question ability of later doctor to make analysis based on records alone.)

[4] At trial, Appellant's attorneys argued to the court the hearing held right before trial was not the post-examination competency hearing, but rather the first hearing, at which the court must have a "doubt" as to a defendant's competency before he can order an evaluation. *See* sections 1175.2 and 1175.3 of Title 22. Trial attorneys also argued that because the hearing was the pre-evaluation hearing, the trial court used the wrong standard in determining there was no merit to Appellant's claim. However, on appeal, Appellant seems to have abandoned that argument, instead referring to both the earlier hearing and the hearing immediately before jury selection as "post-examination competency hearings." Appellant's brief-in-chief at 13; *see also* brief at 15. We therefore need not address the question presented at the trial level concerning which hearing was actually held before trial.

The prosecution's evidence consisted of various jailers who had worked in the jail pod in which Appellant was housed. None of them had noticed anything strange about Appellant, such as compulsive cleaning of his cell, smearing feces on his face or talking while no one else was there. They testified Appellant communicates normally with other inmates and seemed to be aware of his surroundings. The prosecution also presented evidence Appellant had filed two *pro se* civil rights complaints in federal court, one in October 1991 and one in January 1992. When responses were served on him in jail, he appeared to read the responses and understand their contents.

The court was not required to give controlling effect to the opinion of the expert, and instead found in accord with the State's lay witnesses. This is permissible. *Moore v. State*, 672 P.2d 1175, 1177 (Okl.Cr.1983). As we said in *Siah v. State*, 837 P.2d 485, 487 (Okl.Cr.1992), "this Court has never imposed a static analysis for the lower court to apply in all post-examination competency hearings, and we decline to do so now." Examining the entire record of the proceedings before us, *Fox v. State*, 524 P.2d 60, 65 (Okl.Cr.1974) we hold the trial judge did not abuse his discretion in finding Appellant had not met his burden of proving incompetency.

This proposition is without merit.[5]

For his fourth proposition, Appellant alleges the court erred in accepting trial counsel's waiver of his right to have a jury determine competency. On both occasions, the court specifically asked defense counsel if they wanted a jury trial on the issue of competency; on each occasion, they expressly waived it. Defendant acknowledges that; however, he complains they did not consult him before waiving the right, as he claims they must do.

The applicable statute reads in pertinent part:

> B. The court, at the hearing on the application, shall determine, by clear and convincing evidence, if the person is incompetent. . . . . If the court deems it necessary, or if the person alleged to be a person requiring treatment, or any relative, friend, or any person with whom he may reside, or at whose house he may be, *shall so demand*, the court shall schedule the hearing on the application as a jury trial to be held within seventy-two (72) hours of the request, ...

22 O.S.Supp.1985, § 1175.4 (emphasis added). This Court has interpreted that provision to mean a defendant

[5] We feel compelled to address an extremely lamentable comment by the trial judge, if only to show no error occurred other than a slip of the tongue. At the same hearing during which defense counsel expressed his opinion Appellant was faking incompetency (but was not positive that was the case), the court agreed the issue could rise again. In response to counsel's cautionary observation Appellant may not be faking and could damage his chances if he acted up in front of the jury, the court stated: "It's a travesty, perhaps. We're talking about two things. Insanity as a defense to a crime or incompetence to assist counsel. So, if an incompetent person is convicted of a crime that he committed when he was sane, I don't see any harm's done." However, this Court does not look at the record in isolation. During the second competency hearing, the trial court exhibited an overabundance of caution in protecting Appellant's rights. *See* 5-4 Tr. 31-38, 260-272; I Trial Tr. 3-8. In other words, although the court may have made an injudicious comment, his judicious actions belied his words.

is entitled to a jury trial on the issue of competency only if he demands it. *Scott v. State*, 730 P.2d 7 (Okl.Cr. 1986).

Appellant's cases are inapplicable. *Beck v. State*, 626 P.2d 327, 328 (Okl.Cr.1981), concerns itself with section 1162 of Title 22, dealing with sanity, not competency. *Hayes v. State*, 541 P.2d 210, 212 (Okl.Cr.1975) deals with a valid waiver of trial by jury.

Here, Appellant was not speaking to his attorneys. Under the circumstances, they did the best they could, calculating the bench would be kinder to them than a jury would. This proposition is without merit.

III. JURY SELECTION ISSUES

A.

Appellant in his seventh proposition of error complains the prosecutor defined "reasonable doubt" for the jury during voir dire. The record shows during voir dire, the prosecutor asked one prospective juror: "And you can't define it, like we've said, but without telling me what it is, do you think you can come to a conclusion about what that means, what reasonable doubt is, what's reasonable, what's a doubt, all that?"

We find no error, as we find this question did not attempt to define reasonable doubt. *Cf. Diaz v. State*, 728 P.2d 503, 511 (Okl.Cr.1986) (Comment by prosecutor "You have heard all this talk about beyond a reasonable doubt and you heard the Court . . . saying that that is not the same thing as beyond a shadow of a doubt." Did not constitute the prosecutor's "defining" the phrase, nor did the remark create an erroneous impression.); *Wald v. State*, 513 P.2d 330, 333 (Okl.Cr.1973) (Question by prosecutor ". . . does the term 'reasonable doubt' to you in your mind connote to you beyond all doubt whatsoever? In other words the law implies or gives the State of Oklahoma the burden of proving a person charged

with a crime the burden of proving that person guilty beyond a reasonable doubt, but I'm sure all of you have heard the term beyond a shadow of a doubt or beyond all doubt, and what I am asking you, would you hold the State of Oklahoma to a greater degree of proof than the law imposes?" Held, no attempt made by the prosecutor to define the term of reasonable doubt).

Accordingly, this assignment of error is without merit.

B.

In his eighth proposition of error, Appellant contends the trial court improperly excused for cause two panel members based on their answers to questions about the death penalty.

The first juror to which Appellant objects is Florence Fields. She first said she could consider the death penalty in a proper case. She related she had a cousin whose body was found three days after she was abducted and murdered; she had another relative to whom she was not very close who had been stabbed to death by a boyfriend. The abduction and murder occurred approximately five or six months before this trial; the stabbing occurred three or four years before. During questioning by the prosecutor, Ms. Fields then said she did not believe in the death penalty "under no circumstances." Consequently, when asked if she could sentence someone to death, she said she could "not really" do that. At that point, the court stepped back in, reminded her she had said she could do so. When asked to explain her answers, she said "Well, if you consider it all the way around, then I wouldn't. I could consider it, but just to say I would put somebody to death, no." The court, in an attempt to interpret her answer, asked "[y]ou could consider it, but you couldn't put them to death. Is that what you're saying?" to which Ms. Fields responded "yes." Then in response to questioning by defense counsel, she said there were no circumstances where she could give the death penalty. She

then said there might be circumstances where the death penalty was deserved, but "I don't know if I could really do that." She said she would keep an open mind. However, when again asked by the prosecutor, she said she would not ever give the death penalty. At that point, the court excused her for cause.

The Supreme Court in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), dispensed with earlier language in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) by holding a party need not prove a juror's bias against the death penalty with "unmistakable clarity," observing this was because "determination of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Wainwright*, 469 U.S. at 424, 105 S.Ct. at 852.

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror.

Id., 469 U.S. at 424-26, 852-53. We have followed that philosophy. *See, e.g., Robedeaux v. State*, 866 P.2d 417, 424 (Okl.Cr.1993); *Banks v. State*, 701 P.2d 418, 421-422 (Okl.Cr.1985), *cert. denied*, 502 U.S. 1036, 112 S.Ct. 883, 116 L.Ed.2d 787 (1992).

The same thing is true concerning Verna Kolar. She told the court the district attorney's office had prosecuted her brother in a case a few years before; however, she also said her brother admitted the accusations and pled guilty, so she held no grudges. She first said she could base the punishment on the crime and surrounding facts.[6] She then said she could "probably" agree on a verdict imposing death, "but I do not know if I could sleep well that night doing so." The court then observed:

> Well, it's very difficult sometimes for people to sleep for anything, you know. This is one of those times you just have to do what you think is right. You say you probably could. Now we're talking about where the law and the evidence warrant, could you agree on a verdict imposing the death penalty. I'm not trying to make you say one or the other; I'm just asking what you think?
>
> PROSPECTIVE JUROR KOLAR: No, no I could not.
>
> THE COURT: If you found beyond a reasonable doubt that the Defendant was guilty of Murder in the First Degree, and if, understand the evidence, the facts and circumstances of the case, the law would permit you to consider a sentence of death, are your reservations about the death penalty such that, regardless of law, the fact and circumstances of the case, you would not inflict the death penalty?
>
> PROSPECTIVE JUROR KOLAR: No sir, I would not.

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[6] When asked if she had any feelings that would prevent or impair her from considering the death penalty, she replied: "I want to say, yes, I do and, no, I don't. There have been instances when I could answer that easily and say, yes, that person is guilty, that person deserves to die. And there have been other instances when I could not say that."

During questioning by defense counsel, Ms. Kolar said she had said in the past one person or another deserved to die, but "that's because I was out there and I could say those things, because I had no effect whatsoever on that person's life, and here, I do. I cannot easily say that about another human being." On further questioning, Ms. Kolar admitted she could "sit here and say I can [impose the death penalty under the proper circumstances], but there's a lot of difference in sitting right here, even, and walking out that door and doing it. I have no idea what I will do there." The court gave Ms. Kolar the night to consider her position, then excused her the next morning without further questioning. Defense counsel did not object.

The same analysis applies to Ms. Kolar as to Ms. Fields. *Wainwright, supra; Robedeaux, supra, Banks, supra.*

This proposition is without merit.

C.

Appellant then complains his constitutional rights were violated by the use of "death qualification" voir dire questions.

We have repeatedly considered this argument, and have repeatedly rejected it. *Boltz v. State*, 806 P.2d 1117, 1123 (Okl.Cr.1991), *cert. denied*, 502 U.S. 846, 112 S.Ct. 143, 116 L.Ed.2d 109 (1991); *Moore v. State*, 761 P.2d 866, 877 (Okl.Cr.1988); *Johns v. State*, 742 P.2d 1142, 1148 (Okl.Cr.1987); *Banks v. State*, 728 P.2d 497, 502 (Okl.Cr.1986); *Hager v. State*, 665 P.2d 319, 322 (Okl.Cr.1983). We do so yet once again. Appellant's ninth proposition of error is without merit.

IV. FIRST-STAGE TRIAL ISSUES

A.

For his fifth proposition, Appellant claims his case must be reversed because the court gave the jury the standard flight instruction, OUJI-CR 806.[7] Appellant did not testify at trial, nor did he offer any explanation for his conduct.

Appellant points out this Court in *Mitchell v. State*, 876 P.2d 682 (Okl.Cr.1994), declared improper a court's giving the flight instruction in cases where the defendant did not explain his departure. The Court reasoned that giving the instructions in a situation such as this one violated a defendant's presumption of innocence, *see* 22 O.S.1981, § 836,[8] as it "assum[ed] the defendant [has] committed the crime." *Mitchell*, 876 P.2d at 684.

[7] It appears the instruction was based on the evidence Appellant ran when first confronted by police, rather than on evidence Appellant left the scene of the murder, although the record could have been clearer on this point. Appellant's counsel admitted as much during oral argument, pointing out the only reference by the prosecutor to flight during his closing argument was in connection with Appellant's attempts to run from police when spotted several days after the murder.

[8] That section, in effect and unchanged since our laws were adopted from the Dakota Laws of 1887, reads: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted." In supplemental authority, Appellant has provided us with United States Supreme court cases containing dicta which indicate the presumption of innocence is "axiomatic and elementary." *See e.g., In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). We recognize the possibility the presumption of innocence may be so ingrained in our system of justice as to assume Fourteenth Amendment Due Process proportions. However, the law upon which our statutory presumption of innocence is based predates even *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481, 491 (1895), the basis for all subsequent Supreme Court pronouncements on the subject. Indeed, it is this statutory presumption, and

The State acknowledges *Mitchell*, but argues it should be applied prospectively only, since it constituted a "clear break from prior law." State's brief at 25.[9] Appellant in his reply brief cited *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), which held that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past. We must therefore determine whether *Griffith* is applicable in this case. We hold it is not.

Griffith and the retroactivity principle is indeed applicable in all questions concerning federal questions. However, the Supreme Court has never held we must apply the same standard to holdings by this Court dealing with

not any ephemeral Due Process concerns, which provided the basis for *Vuletich v. State*, 735 P.2d 568 (Okl.Cr.1987), quoted by *Mitchell* as authority for the infirmity in language from OUJI-CR 806. It was in *Vuletich* where we said: "[i]t is improper to tell a jury they must determine guilt or innocence. It is the jury's duty to determine whether the State has demonstrated guilt beyond a reasonable doubt. . . . . If the State fails to sustain its burden, the jury must find the defendant not guilty. See 22 O.S.1981, § 836. A determination of innocence is not required." *Id.* at 569.

[9] At oral argument, the State proposed *Mitchell* should be applied to all cases after Appellant's Mitchell himself. We find no authority for that. In cases such as *Fite v. State*, 873 P.2d 293 (Okl.Cr.1993), we declined to apply our ruling to the appellant before us, as to do so would create an "ex post facto"/Due Process violation arising from the new ruling itself. In other situations, the ruling announced also applied to the appellant in that particular case, if it was not a profound break from prior caselaw. *See e.g., People v. Ward*, 206 Mich.App. 38, 520 N.W.2d 363, 366 (1994) (case holding defendant waives complaint of disproportionate sentence by pleading guilty pursuant to a plea bargain applied retroactively to case *sub judice*; result was clearly foreshadowed by other cases). We find no cases—and the State provides none—in which the appellate court made a pronouncement in an appellant's favor, but did not apply that favorable ruling to the appellant before them, who advanced the argument.

issues of state law. To the contrary, the Court has explicitly stated that when questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. *See Harper v. Virginia Dept. of Taxation*, 509 U.S. ——, ——, 113 S.Ct. 2510, 2519, 125 L.Ed.2d 74, 88 (1993); *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 178, 110 S.Ct. 2323, 2330-31, 110 L.Ed.2d 148 (1990); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932); *see also Lackey v. Scott*, 28 F.3d 486, 491 (5th Cir.1994) (Texas Court of Criminal Appeals decision requiring definition of reasonable doubt not governed by *Griffith*, as "Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so"; citing to *American Trucking*); *McSherry v. Block*, 880 F.2d 1049, 1052-53 & n. 2 (9th Cir.1989), *cert. denied*, 499 U.S. 943, 111 S.Ct. 1404, 113 L.Ed.2d 459 (1991); *Diggs v. Owens*, 833 F.2d 439, 442 (3d Cir. 1987) (holding *Griffith* applied to constitutional rules of criminal procedure; does not require retroactive application of "new procedural decisions not constitutionally grounded"); *Royster v. Fauver*, 775 F.2d 527, 529 (3d Cir. 1985); *Galloway v. Beto*, 421 F.2d 284, 289 (5th Cir.1970), *cert. denied*, 400 U.S. 912, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970) (court not bound by Texas court's pronouncement on double jeopardy, but is bound by Texas court's holding on the relationship of two offenses as it affects an implied acquittal doctrine).

This Court has heretofore made pronouncements which it declared would be applied prospectively only. *See e.g., Perez v. State*, 798 P.2d 639, 640 (Okl.Cr. 1990); *State v. Neal*, 604 P.2d 145, 147 (Okl.Cr.1979); *Walton v. State*, 565, P.2d 716, 718 (Okl.Cr.1977). Appellant, however, responds those rulings were based on federal caselaw which was overruled by *Griffith*.

We recognize this, but find it has no bearing on our analysis. A state court is empowered to use federal law in analyzing questions of state law. We are free to use these federal cases as persuasive authority for the purpose of guidance; however they do not themselves compel the result we have reached. *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476-77, 77 L.Ed.2d 1201 (1983). We have done so before, and do so here. *See also Rivers v. State*, 889 P.2d 288, 291 (Okl.Cr.1994).

The basic principles of retroactivity in criminal cases before *Griffith* were established in *Linkletter v. Walker*, 381 U.S. 618, 636, 85 S.Ct. 1731, 1741, 14 L.Ed.2d 601 (1965); *Tehan v. Shott*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966), and *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). In summing up those cases, the Court in *Stovall v. Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967), said:

> "[t]he criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Stovall, 388 U.S. at 297, 87 S.Ct. at 1970. *See also Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984). This is the standard this Court has used previously. *See Edwards v. State*, 591 P.2d 313, 317 (Okl.Cr.1979); *Rutledge v. State*, 527 P.2d 1373, 1375 (Okl.Cr.1974); *Poke v. State*, 515 P.2d 252, 254 (Okl.Cr.1973); *Garrett v. State*, 438 P.2d 945, 948 (Okl.Cr.1968) (ruling correcting deficient instruction to be applied prospectively only). We find these criteria still valid in interpreting our state law questions. *See Griffith*, 479 U.S. at 329-34, 107 S.Ct. at 716-19 (White,

J., with whom Rehnquist, C.J. and O'Connor, J., join, dissenting).[10]

[10] We are not the only state to hold in this fashion. *See People v. Carrera*, 49 Cal.3d 291, 261 Cal.Rptr. 348, 369-71, 777 P.2d 121, 142-48 (1989); *People v. Robinson*, 229 Cal.App.3d 1620, 281 Cal.Rptr. 26, 29 (1991) (defendant convicted, then escaped. In interim, appellate court hands down ruling which would have been favorable to appellant had his appeal been decided earlier. Court refuses to apply retroactively, as to do so would be "inherently offensive to the judicial process."); *Fenelon v. State*, 594 So.2d 292, 295 (Fla.1992) (case banning flight instruction given prospective application only; harmless error analysis conducted); *Green v. State*, 641 So.2d 391, 395 (Fla.1994) (stressing prospectivity); *Taylor v. State*, 630 So.2d 1038, 1042 (Fla.1993), *cert. denied*, —— U.S. ——, 115 S.Ct. 107, 130 L.Ed.2d 54 (1994) (same); *Gray v. State*, 640 So.2d 186, 193-94 (Fla.App.1994) (notes state supreme court moved away from prior caselaw, which would have held *Fenelon* applied retrospectively; cases cited); *Gilliam v. State*, 582 So.2d 610, 612 (Fla.1991) (caselaw requiring sentencing judge in capital case to expressly evaluate in written order each mitigating circumstance to determine whether it is supported by evidence applied prospectively only; prior holdings not fundamental changes, but rather "evolutionary refinements"); *State v. Singletary*, 549 So.2d 996, 999 (Fla.1989) (decision requiring judge to be present during voir dire questioning by attorneys to be applied prospectively only) *Catlett v. State*, 627 So.2d 558, 559 (Fla.App. 1993) (recognizing prospective application of *Singletary*; *People v. Steidl*, 142 Ill.2d 204, 154 Ill.Dec. 616, 633, 568 N.E.2d 837, 854 (1991), *cert. denied*, 502 U.S. 853, 112 S.Ct. 161, 116 L.Ed.2d 125 (1991) (holding in *People v. Gacho*, 122 Ill.2d 221, 119 Ill.Dec. 287, 522 N.E.2d 1146 (1988), *cert. denied*, 488 U.S. 910, 109 S.Ct. 264, 102 L.Ed.2d 252 (1988) requiring new instruction in multiple murders involving mitigating evidence in capital cases was prospective only; *Griffith* not applicable); *Foster v. State*, 639 So.2d 1263, 1298-99 (Miss.1994) (noting prospective application of decision prohibiting use of two specific aggravating circumstances in capital case under common fact pattern); *People v. Sprowal*, 84 N.Y.2d 113, 615 N.Y.S.2d 328, 331-32, 638 N.E.2d 973, 967-77 (1994) (decisions requiring defendant to be present during sidebar conferences between judge and prospective juror to be applied prospectively only, even though absence in some instances could have a "substantial effect" on the ability to defend against the charges); *People v. Garcia*, 161 Misc.2d 1, 612 N.Y.S.2d 552, 555-56 (N.Y.A.D.1994) (recognizing *Griffith*, but using *Linkletter* factors to determine retroactivity of state issue); *Geesa v. State*, 820 S.W.2d 154, 163-65 (Tex.Crim.App.1991) (holding dealing with definition of reasonable doubt prospective only, as it does not change the standard of proof of reasonable doubt; *Griffith* not applicable); *Barnes v. State*, 876 S.W.2d 316, 328 (Tex.Crim.App.1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 174, 130 L.Ed.2d 110 (1994) (following *Geesa*); *Labrum v. Utah State Board of Pardons*, 870 P.2d 902, 912 n. 9 (Utah 1993); *Hurn v. State*, 872 P.2d 189, 198-99 (Alaska App.1994) (decision placing duty on trial judge to make record of a defendant's decision not to testify to be applied prospectively; using factors enunciated in *Linkletter* and *Stovall*); *State v. Adams*, 156 Ariz. 88, 750 P.2d 31, 32 (Ariz.Ct.App.1987); *State v. Ottwell*, 852 S.W.2d 370, 372 (Mo.Ct.App.1993) (State supreme court decision holding instruction on intoxication violated Due Process to be applied prospectively, except in cases where complaint was preserved at trial by appropriate objection).

Having established the criteria this Court uses to determine whether a holding of state law should be retroactive, we now turn to the case *sub judice*.

Concerning (b) the extent of the reliance by law enforcement authorities on the old standards, there can be little debate OUJI-CR 806 "would have been given in the proper situation by every court in this jurisdiction based on caselaw that existed before *Mitchell*." *Rivers*, 889 P.2d at 292. The *Mitchell* Court itself noted use of the instruction had caused "confusion" in the past. *Id.*, 876 P.2d at 685. And this Court has approved of its use in prior cases similar to Appellant's, regardless of whether an explanation was given. *See Id.*, 876 P.2d at 686-87 (Lumpkin, P.J., which whom Lane, J., joins, dissenting), and cases cited therein.

Concerning (c) the effect on the administration of justice of a retroactive application of the new standards and (a) the purpose to be served by the new standards, requiring only a prospective application places Appellant "in the same situation as those on post-conviction, eliminating the inherent inequality that results between appellants whose appeals are separated only by time." *Rivers*, 889 P.2d at 292. It also eliminates the inherent unfair-

ness which a clear break with prior existing caselaw can place on the court below, who gave the instruction in good faith. *Id.*

We therefore hold *Mitchell* does not automatically apply retroactively, *see Rivers*, 889 P.2d at 292, and it does not apply in this case.

There is another, equally compelling, reason *Mitchell* does not apply here. This Court in *Mitchell* made it clear whether reversible error occurred would be determined by the particular facts of each case. *See Id.*, 876 P.2d at 685 ("*Based on the facts in this case*, it was reversible error to give instructions on flight" (emphasis added)). This fact-specific dictate is also reflected in *Kentucky v. Whorton*, 441 U.S. 786, 788-89, 99 S.Ct. 2088, 2089-90, 60 L.Ed.2d 640 (1979). There, a state district court failed to give an instruction on the presumption of innocence. The Kentucky Supreme Court reversed, feeling such an instruction was mandated by *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). The United States Supreme Court disagreed, stating the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution. Rather, "such a failure must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial." *Whorton*, 441 U.S. at 789, 99 S.Ct. at 2090. *See also Hyatt v. State*, 779 P.2d 993, 995 (Okl. Cr.1989) (following *Whorton*).

The facts of this case do not require reversal. As noted above, it seems clear the flight instruction was given here not based on Appellant's flight from the *crime*, but from his flight from *police* several days after the crime. The evidence showed when Appellant was apprehended after the chase, he was carrying a device commonly used to

smoke crack cocaine. He was arrested for possession of drug paraphernalia based on this charge.

Therefore, *Mitchell* is not applicable here, as it does not "assume the defendant to have committed the crime" for which he was on trial. *Mitchell*, 876 P.2d at 684. If anything, the instruction was improperly given, not because of flight to avoid arrest on a murder charge, but because it would tend to show he committed the crime of possession of drug paraphernalia, a crime with which he was not charged. *See Compton v. State*, 74 Okl.Cr. 48, 53, 122 P.2d 819, 821 (1942) (flight signifies not merely leaving, but leaving under a consciousness of guilt and for the purpose of evading arrest). Accordingly, we find any error in giving the flight instruction was harmless, as the misdirection of the jury has not "resulted in a miscarriage of justice," or has not constituted "a substantial violation of a constitutional or statutory right." 20 O.S. 1991, § 3001.1.

Consequently, we find Appellant's fifth proposition to be without merit.

B.

At trial, Appellant's attorneys submitted the following handwritten instruction defining reasonable doubt.

> "You are instructed that the term proof beyond a reasonable doubt means evidence which creates a moral certainty as to the guilt of the defendant. If the evidence does not amount to a moral certainty in your mind you must find the defendant not guilty."

The instruction was refused. For his sixth proposition, Appellant claims the court erred in refusing the instruction.

We disagree. This Court has a long history of holding it is error to give an instruction defining reasonable doubt, whether it is requested by the defendant, *see Grant v. State*, 703 P.2d 943, 946 (Okl.Cr.1985), *Spitznas v.*

State, 666 P.2d 1307, 1307-08 (Okl.Cr.1983), *Templer v. State*, 494 P.2d 667, 671-72 (Okl.Cr.1972) *Mott v. State*, 94 Okla.Crim. 145, 156, 232 P.2d 166, 177 (1951); or given by the court, *see Fellows v. State*, 508 P.2d 1089, 1090-91 (Okl.Cr.1973), *Young v. State*, 373 P.2d 273, 277-79 (Okl.Cr.1962), *cert. denied*, 371 U.S. 957, 83 S.Ct. 513, 9 L.Ed.2d 504 (1963); *Brookshire v. State*, 284 P.2d 752, 754-55 (Okl.Cr.1955), *Lippoldt v. State*, 271 P.2d 745, 749 (Okl.Cr.1954), *Wallace v. State*, 96 Okl.Cr. 163, 164-65, 250 P.2d 484, 485-86 (1952). This is so because to give such an instruction tends to confuse the jury.

Specifically, we have addressed the "moral certainty" language requested by appellant's trial counsel. In doing so, we stated:

> Fourthly, the defendant complains of error in trial court by a refusal to allow the defense counsel to use the term 'moral certainty' as synonymous with 'beyond a reasonable doubt'. . . .
>
> The defendant goes on . . . to urge that the court committed error in refusing to allow the defendant an instruction on the terms 'moral certainty' and 'beyond a reasonable doubt.' Defendant cites as his only authority . . . the case of *Gray v. State*, 56 Okl.Cr. 208, 38 P.2d 967 (1934), wherein the Court held that while the terms 'moral certainty' and 'beyond a reasonable doubt' are synonymous in some dictionaries, the difficulty is that the words 'moral certainty' add nothing to the words 'beyond a reasonable doubt,' as one may require explanation as much as the other. We also observe that *Gray*, supra, as well as a number of more recent cases, holds that it is not necessary for the trial court to define what is meant by a 'reasonable doubt,' and trial courts have been repeatedly admonished against giving any instruction attempting to define the term 'reasonable doubt.'

> In more recent years, trial courts have been severely criticized by this Court for attempting to define the term 'reasonable doubt.' See *Bell v. State*, Okl.Cr., 381 P.2d 167 (1963); and, it has even been held reversible error to so define this difficulty-of-definition term. *Wilson v. State*, Okl. Cr., 403 P.2d 262 (1965); *Lee v. State*, Okl.Cr., 430 P.2d 858 (1967).
>
> We reiterate the phrase 'reasonable doubt' is self-explanatory, and definitions thereof do not clarify its meaning, but rather tend to confuse a jury; therefore, instructions defining it are unnecessary, and should not be given. The same logic should apply in attempts in voir dire examinations to explain to the jury what is meant by 'reasonable doubt.'

Templer, 494 P.2d at 671-72. *See also Victor v. Nebraska*, 511 U.S. ——, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).

Accordingly, Appellant's sixth proposition is without merit.

C.

In his tenth proposition, Appellant alleges the court erred in allowing into evidence a color photograph of Mr. Sheppard taken at the scene. The photograph showed the position of the body after it had been rolled off its side. It displayed characteristics of a body which had been left unattended for four days. During the second stage, the prosecution introduced photographs of Mrs. Warner as she was found half-nude in her residence. Other photographs depicted the injury caused by the ramming of the knife-sharpening tool into her neck.

We have carefully reviewed the photographs and do not find them unduly gruesome. As we recently said in *McCormick v. State*, 845 P.2d 896, 898 (Okl.Cr.1993), "[g]ruesome crimes result in gruesome photographs." We find no abuse of the trial court's discretion in admitting the photographs. Accordingly, this proposition is without merit.

V. COMPETENCY OF COUNSEL

Appellant next argues his counsel was incompetent. He bases this allegation on two grounds. The first is his attorney's sharing his beliefs with the court Appellant was "faking" incompetence. The second portion relates to his incompetence to stand trial; he essentially argues his counsel was incompetent in his representation because Appellant himself was incompetent, and therefore could not communicate with counsel.

The second portion of Appellant's arguments hinges on the trial court's determination he was competent. If Appellant was competent and merely malingering, any lack of communication with counsel was solely Appellant's fault; if Appellant were incompetent, this case would be reversed on that basis. Therefore, we will reserve the second portion of Appellant's argument until we reach the threshold matter of Appellant's competency.

Concerning the first portion of the proposition, the record shows counsel filed an application for determination of competency in August 1990. At that time, Appellant was examined by a psychologist who recommended he be sent to Eastern State Hospital at Vinita for examination, which the District Court ordered. Upon completion of his treatment, Appellant was returned to Oklahoma County, where his counsel waived determination by jury. A post-examination competency hearing presented to the bench was held, and at the conclusion of the hearing Appellant was adjudged competent. During that hearing, defense counsel presented the same psychologist who had examined Appellant before he went to Vinita. He claims on appeal counsel was ineffective for failing to get a new psychologist, someone who could base impressions on an interview with Appellant after his return from Vinita instead of relying almost exclusively on data obtained before he left.

We first address the claim counsel was somehow incompetent because he was candid with the court in sharing

his belief Appellant was "faking" competency. This did not occur during either the first competency hearing or even during the second one; rather, counsel made his comment at the end of another hearing discussing other motions which occurred after the first competency hearing. Counsel felt the need to make a record on his client's uncooperative and threatening attitude. Counsel also quickly followed up his personal belief with the statement he was not a doctor, and others in his office felt Appellant was incompetent; therefore, he felt obliged to raise the issue again. After the court reminded counsel of the results of the first competency hearing, counsel observed incompetency could happen at any time, then essentially let the matter drop at that time.

However, immediately before the start of jury selection proceedings, the same counsel recanted his earlier statements, telling the court his client was incompetent and requested another hearing.

In short, counsel had not made his statements at the first hearing. After the first hearing and before the second one, counsel as an officer of the court candidly expressed his impressions, as he had a duty to do. *Model Rules of Professional Conduct* Rule 3.3(a)(2),[11] 5 O.S.Supp. 1988, Ch. 1, App. 3-A. By the time of trial and the second hearing, counsel recanted his statements. Appellant has cited us no authority—and we know of none—declaring an attorney incompetent as a matter of constitutional law because that attorney may harbor doubts as to his client's sincerity in a criminal proceeding.

Concerning counsel's failure to obtain another expert for the post-examination competency hearing, we find no error. Evaluating the entire record of competency pro-

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[11] That rule reads:

(a) a lawyer shall not knowingly:

. . . .

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid a criminal or fraudulent act by the client.

ceedings before us, *Fox v. State*, 524 P.2d 60, 65 (Okl. Cr.1974),[12] selection of another expert would not have changed the outcome of the proceedings. The record was virtually brimming with evidence Appellant was malingering (that evidence is discussed in II.B., above).

Absent evidence to the contrary, and examining counsel's performance during both hearings, we cannot declare that Appellant has rebutted the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Camron v. State*, 829 P.2d 47, 56 (Okl.Cr.1992) (citing *Strickland v. Washington*, 466 U.S. 668, 694-96, 104 S.Ct. 2052, 2068-69, 80 L.Ed.2d 674 (1984); or that but for his conduct, there was a reasonable probability the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* 829 P.2d at 56; *Strickland*, 466 U.S. at 698, 104 S.Ct. at 2070.

In light of the discussion contained in Appellant's third proposition, it follows Appellant's counsel was not incompetent because he could not communicate with Appellant either in preparing for or during trial. As we have previously observed, "[a]lthough appellant was a difficult client to repreesnt, he was not an incompetent one." *Johnson v. State*, 761 P.2d 484, 492 (Okl.Cr.1988). The decision not to communicate with counsel was Appellant's alone; whatever reasons he may have had for not communicating, it was not because he was unable to do so.

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[12] There, we said:

> It is not sufficient for the defense counsel merely to say that he is unable to communicate with his client; and, that his client's mental processes seem to waver while he is discussing the case with him; and, that his client does not understand the seriousness of a charge, to constitute justification for a finding that the defendant is mentally incompetent. In considering this question it is necessary that we consider the entire record.

VI. SECOND-STAGE TRIAL ISSUES

A.

Appellant next contends the court committed error by failing to instruct the jury it had the option to return a life senence regardless of its findings of aggravating circumstances.

We have rejected this argument previously. *Williamson v. State*, 812 P.2d 384, 410 (Okl.Cr.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 1592, 118 L.Ed.2d 308 (1992). We do so again.

This eleventh proposition is without merit.

B.

Appellant next contends the court erred in failing to instruct the jury it could consider sympathy for the accused in assessing punishment.

We have addressed this issue before and have continually found it to be lacking. *Stout v. State*, 817 P.2d 737, 740 (1991). We do so again.

This twelfth proposition of error is without merit.

C.

Appellant in his thirteenth proposition of error contends the court erred in not instructing the jury its findings concerning mitigating circumstances did not have to be unanimous.

This, too, has been considered and rejected by this Court. *Mayes v. State*, 887 P.2d 1288, (Okl.Cr.1994).

Accordingly, this proposition of error is without merit.

D.

For his fourteenth proposition of error, Appellant asserts the court erred in giving instructions which permitted jurors to ignore mitigating evidence.

We have rejected this argument as well. *Williamson*, 812 P.2d at 409. We do so again.

This proposition is without merit.

E.

In his fifteenth proposition of error Appellant claims the instruction defining "heinous, atrocious or cruel" is unconstitutional because it does not adequately channel the jury's discretion.

We addressed this argument in *Nuckols v. State*, 805 P.2d 672, 674 (Okl.Cr.1991), *cert. denied*, 500 U.S. 960, 111 S.Ct. 2276, 114 L.Ed.2d 727 (1991). We see no need to address it again. *See also Walton v. Arizona*, 497 U.S. 639, 654-55, 110 S.Ct. 3047, 3057-58, 111 L.Ed.2d 511, 529 (1990); *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); *United States v. Pretlow*, 779 F.Supp. 758, 773 (D.N.J. 1991); *United States v. Cooper*, 754 F.Supp. 617, 623 (N.D.Ill.1990); *Nguyen v. State*, 769 P.2d 167, 174 (Okl.Cr.1988), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3264, 106 L.Ed.2d 609 (1989).

We find no merit to this proposition.

F.

For his sixteenth proposition, appellant contends there was insufficient evidence to sustain the aggravating circumstance he killed Mr. Sheppard to avoid arrest or prosecution for burglary.

The existence of this aggravating circumstance is determined by looking at the killer's intent. *Romano v. State*, 847 P.2d 368, 387 (Okl.Cr.1993), *aff'd*, 512 U.S. ——, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994); *Williamson v. State*, 812 P.2d 384, 407 (Okl.Cr.1991), *cert. denied* —— U.S. ——, 112 S.Ct. 1592, 118 L.Ed.2d 308 (1992); *Stouffer v. State*, 738 P.2d 1349, 1361-1362 (Okl.Cir.1987), *cert. denied*, —— U.S. ——, 112 S.Ct. 1573, 118 L.Ed.2d 217 (1992); *Moore v. State*, 736 P.2d 161, 165 (Okl.Cr.1987), *cert. denied*, 502 U.S. 913, 112 S.Ct. 313, 116 L.Ed.2d 255 (1991). In the absence of his own statements of intent, such evidence may be inferred from circumstantial evidence. *Banks v. State*, 701 P.2d 418, 426 (Okl.Cr.1985); *cert. denied*, 502 U.S. 1036, 112 S.Ct. 883, 116 L.Ed.2d 787 (1992).

Evidence during the second stage indicated Appellant had been convicted of robbing two men whom he had allowed to live. Those men gave a description of Appellant and the vehicle that ultimately allowed Appellant to be captured and imprisoned. This was true even though the victims did not know Appellant. This would tend to show a reluctance to allow another victim to live, even though he did not know the victim. The evidence also showed Appellant pulled down the shades during the burglary of Mr. Sheppard's house and wiped down what was probably the murder weapon. Both these acts tend to show Appellant did not want to be detected or identified by anyone. In the light most favorable to the prosecution, this evidence would tend to show Appellant murdered Mr. Sheppard so he would not be detected or arrested as a result of his burglary. *See Parks v. State*, 651 P.2d 686, 695 (Okl.Cr.1982), *cert. denied*, 459 U.S. 1155, 103 S.Ct. 800, 74 L.Ed.2d 1003.

Appellant also contends this Court has applied the "avoiding arrest" aggravating circumstance, codified at 21 O.S. § 701.12(5),[13] in a standardless, *ad hoc* fashion, rendering it unconstitutionally vague. However, Appellant has not supported his contentions with relevant argument and citations of authority, instead making vague refer-

[13] That statute reads in pertinent part:

Aggravating circumstances shall be:

. . . .

5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

ences to other aggravating circumstances he claims are also unconstitutionally vague. Therefore, we will not address it. *Munson v. State*, 758 P.2d 324, 335 (Okl.Cr. 1988), *cert. denied*, 488 U.S. 1019, 109 S.Ct. 820, 102 L.Ed.2d 809. We note in passing the Oklahoma death penalty statutes have previously been held to be constitutional. *See Jones v. State*, 660 P.2d 634, 643 (Okl.Cr. 1983).

Accordingly, this proposition is without merit.

G.

In his seventeenth proposition of error, Appellant claims the trial court erroneously allowed evidence of unadjudicated crimes and bad acts to be submitted to the jury. He points with particularity the evidence he murdered Mrs. Warner. He claims this violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution.

The evidence in question was used in support of the aggravating circumstance a probability existed Appellant would commit criminal acts of violence that would constitute a continuing threat to society. There is no requirement of a prosecution resulting in a conviction for this continuing threat aggravator to be applied. 21 O.S.1981, § 701.12(7). Indeed, this Court has held that unadjudicated acts can be used to prove the defendant is a continuing threat to society. *Walker v. State*, 723 P.2d 273, 285 (Okl.Cr.1986), *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 600 (1986); *Johnson v. State*, 665 P.2d 815, 822-23 (Okl.Cr.1982). The reason for this was explained in *Johnson*, where this Court quoted from *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) to the effect that a jury can consider several things to determine whether a defendant should receive the death penalty, adding:

> This Court also finds persuasive the language used by the Model Penal Code. Section 210.6 of the Model Penal Code provides in part:
>
> > In the proceeding, [sentencing] evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in . . . this Section. Any such evidence, not legally privileged, which the Court deems to have probative force, may be received, . . ., provided that the defendant's counsel is accorded a fair opportunity to rebut such evidence. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
>
> Therefore, it is not necessary there be a final conviction for an unrelated criminal offense to be admissible at the sentencing stage. Prior criminal activity is relevant to the jury determination on the aggravating circumstance the defendant would constitute a continuing threat to society. It is "essential that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek*, *supra*. The evidence of the Lawrence killing was properly admitted.

Johnson, 665 P.2d at 822-23. Here, Appellant was given ample opportunity to rebut the unadjudicated acts against Mrs. Warner, which he did in an exemplary manner. We find the evidence tested under the fire of cross-examination to be reliable. Accordingly, Appellant's proposition is without merit.

H.

For his eighteenth proposition, Appellant alleges the "continuing threat" aggravating circumstances is vague and overbroad. We have repeatedly rejected that argument. *See Malone v. State*, 876 P.2d 707, 7715-16 (Okl.Cr.1994) and cases cited therein; *Snow v. State*, 876 P.2d 291, 298 (Okl.Cr.1994).

This proposition is without merit.

I.

As a follow-up proposition, Appellant contends the jury relied upon the unconstitutional aggravating circumstances of heinous, atrocious or cruel; continuing threat; and avoiding arrest or prosecution in arriving at its decision. As we have found none of the aggravators constitutionally infirm, this nineteenth proposition is without merit.

J.

In his twentieth proposition, Appellant contends the death penalty procedure is unconstitutional, as it allows the prosecutor to have unbridled discretion in determining when to seek the death penalty.

We considered this identical argument in *Romano v. State*, 847 P.2d 368, 392-93 (Okl.Cr.1993), *aff'd*, 512 U.S. ——, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994), and rejected it there. We do so again.

K.

In his twenty-first proposition of error, Appellant states the trial court allowed an improper application of the aggravating circumstance the murder was commited by a person while serving a sentence of imprisonment on conviction of a felony, 21 O.S.1981, § 701.12(6). A brief discussion is required here.

Evidence at trial showed Appellant had been sentenced to the penitentiary for two convictions of robbery

with a firearm in Oklahoma County case CFR-80-3020. He was incarcerated January 19, 1981. After being released, he committed second degree burglary and was placed back in the penitentiary system on July 20, 1987. Appellant was admitted to the Pre-Parole Conditional Supervision (PPCS) program and the procedure was explained to him on June 27, 1989.

The evidence also established that under the PPCS program, if an inmate does not agree to abide by certain rules and conditions, he can be returned to prison. For the first month or so, Appellant did well on the program; however, he missed an office visit in August and had some curfew violations. The first part of September, Appellant's probation officer had decided to classify Appellant as a program failure and send him back to a lockdown unit; however, she was unable to do so because of a bed shortage in prisons. Mr. Sheppard was killed September 4; Mrs. Warner was killed September 16. During this time, Appellant was still in PPCS.

Appellant acknowledges he was on the PPCS program, but argues the aggravator the jury found does not apply to those in his situation.

> The statute reads in pertinent part: Aggravating circumstances shall be:
>
> . . . .
>
> (6) The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;

Appellant argues the statute is only applicable to those inside the prison walls; therefore, he was not actually "serving" a term of imprisonment at a Department of Corrections institution at the time of the killing.

We have not addressed this particular aspect of this aggravator before. However, we have held those who are in the PPCS program are still incarcerated. *See Barnett v. Moon*, 852 P.2d 161, 162 (Okl.Cr.1993) (". . . *pre* parole is by definition not parole, but a prepa-

ratory status to parole itself. And since "parole" means release from jail, prison or other confinement after actually serving part of a sentence, logically *pre* parole means *before* such release."); *Harper v. Young*, 852 P.2d 164, 165 (Okl.Cr.1993) ("As set forth in *Barnett*, the question concerning the PPCS program is not whether an inmate is in custody, because he is; but the degree of confinement used in that custody. The degree of confinement is not of concern to this Court, so long as an administrative procedure affords an appropriate method by which the decision to change the degree of confinement can be justified."). We have held in other areas an inmate need not actually be confined within prison walls to be considered imprisoned. *Hunt v. State*, 793 P.2d 1366, 1368 (Okl.Cr.1990) (defendant outside prison walls on limited pass can be convicted of "escape"); *McCoy v. State*, 536 P.2d 1309, 1312 (Okl.Cr.1975) (inmate who escapes from hospital can be convicted of escape). *See also Urbauer v. State*, 744 P.2d 1274, 1275 (Okl.Cr.1987) ("for purposes of escape from a penal institution, 'custody' may be restraint by either physical means or a superior force acting as a moral restraint.") Given these earlier cases indicating one need not be behind bars to be "imprisoned," and the fact the conditions of PPCS were explained to him when he was released from a correctional facility, Appellant cannot claim he did not have notice his status was the same.

Clearly, Appellant was "imprisoned" as the term is commonly defined. It seems obvious the Legislature enacted this aggravator in order to protect persons who, even though they may be incarcerated, are still members of society. It makes little sense to hold the aggravator can be used to protect one segment of society, while not protecting an even greater segment of that same society.[14]

[14] The Alabama Court of Criminal Appeals was faced with a similar situation in *Whisenhant v. State*, 555 So.2d 219 (Ala.Cr.App. 1984), *aff'd*, 555 So.2d 235 (Ala.1989), *cert. denied*, 496 U.S. 943, 110 S.Ct. 3230, 110 L.Ed.2d 676 (1990). There, a defendant committed a murder while on parole. The court held that was sufficient to satisfy the aggravating circumstance the murder was committed while "under sentence of imprisonment." *Id.*, 555 So.2d at 229, 231.

Therefore, this proposition is without merit.

L.

For his twenty-second and last proposition of error, Appellant claims as unconstitutional the statutory requirement a jury list aggravating circumstances as specific findings of fact before the death penalty can be imposed. He claims this runs afoul of the constitutional prohibition against special verdicts found in Okla. Const. art. 7, § 15.[15]

We have previously addressed that contention in *Romano v. State*, 847 P.2d 368, 384-85 (Okl.Cr.1993), *aff'd*, 512 U.S. ——, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994). We see no need to address it again.

VII. MANDATORY SENTENCE REVIEW

This Court is required by 21 O.S. 1991, § 701.13(C) to determine whether (1) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, and (2) whether the evidence supports the jury's finding of aggravating circumstances as enumerated in 21 O.S. 1981, § 701.12. Pursuant to this mandate, we shall first determine whether the evidence was sufficient to support the imposition of the death penalty.

The prosecution alleged five aggravating circumstances: Appellant was previously convicted of a felony

[15] That section reads:

> In all jury trials the jury shall return a general verdict, and no law in force nor any law hereafter enacted, shall require the court to direct the jury to make findings of particular questions of fact, but the court may, in its discretion, direct such special findings.

involving the use or threat of violence to the person (21 O.S.1981, § 701.12(1)); the murder was especially heinous, atrocious, or cruel (21 O.S.1981, § 701.12(4)); the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution (21 O.S.1981, § 701.12(5)); the murder was committed by a person while serving a sentence of imprisonment on conviction of a felony (21 O.S.1981, § 701.12(6)); there existed a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society (21 O.S.1981, § 701.12(7)).

The jury found the existence of all five. We have addressed the sufficiency of the evidence supporting murder during imprisonment; and the evidence supporting the aggravator he killed Mr. Sheppard to avoid arrest or prosecution for burglary.

To show prior violent felonies, the prosecution presented witnesses who had been victims of a robbery and car theft committed by appellant in 1980. The witnesses were getting in a vehicle outside a supermarket in Oklahoma City when Appellant approached them, pointed a pistol at them and angrily threatened to blow their heads off if they did not give him their money and the car keys. Another witness testified Appellant became friendly with her to the point she began to feel uncomfortable around him and would not answer her door when he would attempt to visit her. One night when she arrived at her Bethany apartment she saw movement in her apartment before she entered. She notified police, who chased down and arrested Appellant. Appellant had rifled through her belongings; and was carrying an electrical cord he had ripped from an appliance in the apartment. The cord was approximately five and one-half to six feet long; and the clear implication was Appellant intended to use the cord in some manner against the woman who occupied the apartment. Evidence showed Appellant was convicted of two counts of robbery relating to the supermarket holdup, and one count of second degree burglary relating to entering the woman's apartment in Bethany.

This evidence is sufficient to support the aggravating circumstance Appellant was previously convicted of a felony involving the use or threat of violence to the person.

Also supported by the evidence is the aggravating circumstance there existed a probability Appellant would commit criminal acts of violence that would constitute a continuing threat to society.

Mr. Sheppard was killed on or about September 4, 1989. On September 17, the brutalized body of Monteen Warner was found inside her home at 1021 N.E. 6th, a few blocks from Mr. Sheppard's home. A television set was missing from the home. Ms. Warner was naked from the waist down, a plastic bag over her head. A nylon rope or belt was found underneath her. Also found under the body was a wooden mallet broken in two. A sharpening steel, bent at the handle with traces of human blood on it, was also found; the object was apparently hammered into the victim's throat. In addition, numerous bruises were found on her body. An autopsy revealed she had been choked with enough force to break a bone in the neck, Cause of death was suffocation. Evidence both at the scene and from other witnesses connected Appellant to this crime. The evidence also indicated Appellant had performed some yard work for Ms. Warner, and was unhappy about how much he was paid.

Other evidence showed Appellant seriously beat a fellow inmate in the county jail in June 1990. Witness heard Appellant tell the inmate, David Schnelle, he was going to kill him. Schnelle had to be hospitalized; he required surgery to remove a broken bone from his retina, an eye was knocked out of its socket, and a cheek bone was broken in the beating. No explanation was given for the beating; but Appellant became angry at Schnelle sev-

eral days before during a card game, and had threatened to beat him.

In February 1992 during a search of Appellant's cell, authorities found a homemade ice pick consisting of three metal rods (originally reinforcement rods in the concrete around the jail windows) sharpened at one end and tied together with torn sheets.

This evidence more than supports the aggravating factor that there existed a probability Appellant would commit criminal acts of violence that would constitute a continuing threat to society.

The remaining aggravating circumstance is the murder was especially heinous, atrocious, or cruel. The 86-year-old Mr. Sheppard was stabbed in the abdomen; there were three stab wounds on the left side of the victim's neck; there were cuts on his hand. The characteristics of the wounds indicated they may have been made by someone behind the victim; who reached around and stabbed him in the front. The cuts on the hand indicated the victim struggled to fend off the knife. The knife wound to the abdomen was two and one-eighth inches wide, and extended at least four and one-half inches into the body, damaging the large intestine, small intestine, the liver, and the diaphragm. The medical examiner testified death was not immediate; the victim could have lived as long as 30 minutes or more. The crime scene revealed blood all over the bedroom, including large puddles on a dresser, as if the victim had doubled over the dresser at some point. He was not found in front of the dresser. Presence of the blood throughout the bedroom indicates the victim did not immediately lose consciousness after being stabbed repeatedly; rather, he moved around the room before falling between the bed and the wall.

In the light most favorable to the prosecution, this evidence supports the jury's finding the murder was especially heinous, atrocious or cruel. It showed the victim suffered serious physical abuse while still conscious.

In contrast to this evidence in support of aggravation, Appellant presented the following mitigating circumstances: he was abandoned by his father by age 3; by age 4 he was begging on the streets; his developmental history was slowed by a poor home life; an adverse psychological impact of being told his parents had been killed when they had not been; the only father figure in his life was killed by his mother while he was still relatively young; his growth years were marred by a mother with alcohol problems who physically abused him by beating him with extension cords, sticks, bats and other items; his mother's rejection of him after he was released from a delinquent boys' home; adverse influences and condition at the boys' home; he had been institutionalized for approximately 12 years of his first 18 years of life; he was sexually abused while in prison; he was addicted to drugs at an early age, and was addicted at the time of the homicide.

Reviewing the evidence in mitigation and aggravation, we find the sentence of death to be factually substantiated and appropriate. We find no indication the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor.

VIII. CONCLUSION

Finding no error warranting reversal or modification, the judgment and sentence for Murder in the First Degree is AFFIRMED.

JOHNSON, V.P.J., and LANE and STRUBHAR, JJ., concur.

CHAPEL, J., concurs in results.

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

(Title Omitted in Printing)

**ORDER DENYING REHEARING
AND DIRECTING ISSUANCE OF MANDATE**

Petitioner has filed a Petition requesting this Court grant rehearing and stay the mandate in *Cooper v. State*, —— P.2d ——, 66 OBJ 166 (Okl.Cr. 1-10-95). In it, Appellant alleges two reasons why rehearing should be granted: this Court erred in ruling the presumption of innocence is a state, and not federal constitutional right; and this Court erred in ruling a mental health professional could give an opinion based on inadequate medical records.

We find Petitioner is not entitled to a rehearing as he has failed to show that our opinion in this case conflicts with current case law or an express statute; and he has not presented this Court with some question decisive of the case that has been submitted by the attorney of record and overlooked by this Court. Those are the sole grounds upon which rehearing can be based. *See* 22 O.S.Supp.1994, Ch. 18, App. *Rules of the Court of Criminal Appeals*, Rule 3.14(B)(1) & (2).

This Motion for Rehearing is DENIED. The Clerk of this Court is ordered to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 13th day of February, 1995.

/s/ Charles A. Johnson
CHARLES A. JOHNSON
Presiding Judge

Not Participating
CHARLES S. CHAPEL
Vice-Presiding Judge

/s/ Gary L. Lumpkin
GARY L. LUMPKIN
Judge

/s/ James F. Lane
JAMES F. LANE
Judge

/s/ Reta M. Strubhar
RETA M. STRUBHAR
Judge

SUPREME COURT OF THE UNITED STATES

No. 95-5207

BYRON KEITH COOPER,
Petitioner

v.

OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 16, 1995. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 15, 1995. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 3, 1996. Rule 29.2 does not apply.

October 5, 1995

(5)

Supreme Court, U.S.
FILED
NOV 14 1995
CLERK

No. 95-5207

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BYRON KEITH COOPER,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Oklahoma

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BRIEF FOR THE PETITIONER

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56 pp

QUESTION PRESENTED

May a state, consistent with the Eighth and Fourteenth Amendments, allocate a level of proof as high as clear and convincing evidence on a defendant in determining his competency to stand trial?

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OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported as *Byron Keith Cooper v. State of Oklahoma*, 889 P.2d 293 (Okla. Crim. App. 1995), and is reproduced in Appendix "A" of the Petition for Certiorari and in the Joint Appendix (hereinafter "App.") at 50-97. The order denying Petitioner's petition for rehearing is unpublished. App. 98-99.

JURISDICTION

Jurisdiction of this Court rests upon 28 U.S.C. § 1257 (a) (1988), Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States. The petition for certiorari was filed July 13, 1995, and granted on October 5, 1995.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV § 1 (excerpt):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Okla. Stat. tit. 22, § 1175.4 (excerpt):

> The court, at the hearing on the application, shall determine, by clear and convincing evidence, if the person is incompetent. The person shall be presumed to be competent for the purposes of the allocation of the burden of going forward with the evidence.

STATEMENT OF THE CASE

1. Pre-Trial Proceedings

Byron Keith Cooper was charged with Murder in the First Degree on December 4, 1989 for the September 4, 1989 stabbing death of Mr. Harold Sheppard during the commission of a burglary. Mr. Cooper became a suspect after using Mr. Sheppard's J.C. Penney card. A watch and two cameras belonging to Mr. Sheppard were found in the home where Mr. Cooper had been staying. At Mr. Sheppard's house, authorities found Cooper's fingerprints on a flashlight, a metal can, a watch case and a carton of cigarettes. Serious questions regarding Mr. Cooper's competency to stand trial arose thereafter and reappeared repeatedly throughout the trial court proceedings.

a. *The August, 1990, Incompetency Determination*

In early August, 1990, counsel sought and obtained a judicial order to evaluate Mr. Cooper's competency to stand trial, because of serious concerns about Cooper's mental competency. (Record 336-37, 344-45). Dr. Edith King, a clinical psychologist employed by the Oklahoma Department of Mental Health, examined Cooper shortly thereafter and determined he was incompetent to stand trial. Among other things, she found him to be inattentive, irrational, incoherent, delusional, unable to focus on her questions, and unable to communicate effectively. (Transcript of Competency Hearing of December 20, 1990 and January 18, 1991, [hereinafter "C.H.I"] 4-30). After the prosecution made no effort to contest this evaluation the court committed Cooper to Eastern State Hospital, a state mental health facility, to be treated.

b. *The Second Exploration into Competency*

Upon his return from the hospital, another hearing on Mr. Cooper's competency was held in December, 1990, and January, 1991. Dr. King testified to her earlier finding of incompetency and told the court that in her opinion,

Cooper displayed a thought disorder and possibly experienced auditory and/or visual hallucinations. (C.H.I 7). She concluded that during her evaluation Cooper's disorientation and confusion were not feigned. (C.H.I 19). At the time of her testimony, Dr. King observed Cooper seemed oriented and no longer had the wild, out-of-control look he had when she had examined him earlier. (C.H.I 27-28, 32).

To rebut Mr. Cooper's evidence of incompetency, the prosecution called Eastern State Hospital psychologist Jeanne Russell. Russell did not actually participate on the team that treated Mr. Cooper, but she had conducted a screening interview two and a half months after his admission and evaluated his progress at the hospital. (C.H.I 38-40, 48). In Russell's opinion, Cooper understood the nature of the charges, was able to consult with counsel, and was not a mentally ill person as defined by statute. Moreover, she opined he was malingering and competent to stand trial. (C.H.I 43-44, 51).

On the basis of this record, the court found Mr. Cooper competent to stand trial. (C.H.I 101). The court made no finding Cooper was malingering.

c. *The Third Exploration into Competency*

More than one year and three months later, at the close of a motion hearing, Cooper's lead counsel again raised the issue of incompetence. (App. 3-7). Counsel stated he was ready for trial, but was concerned about Cooper's bizarre behavior both in the courtroom and in the county jail and that two investigators from the Oklahoma County Public Defender's Office who had spent considerable time with Cooper believed he was "cracking up." Counsel recognized he was not a doctor, acknowledged that Cooper might be faking, and offered the prosecution the opportunity to pick any doctor to assess Mr. Cooper and indicated he would pay for it.

The trial judge responded that he was not inclined to revisit his finding of fifteen months earlier:

> We're talking about two things. Insanity as a defense to a crime or incompetence to assist counsel. So, if an incompetent person is convicted of a crime that he committed when he was sane, I don't see any harm's done. (App. 6).

d. *The Fourth Exploration into Competency*

Trial on the merits was scheduled to begin on May 4, 1992. But on that day again, Cooper exhibited strange behavior that suggested he was not competent to stand trial. As his attorney described his appearance, "his hair's poked out and going in every direction and it's unkept and he looks like heck." (Transcript of Pre-Trial Motions and Competency Hearing May 4 and 5, 1992 [hereinafter "C.H.II"] 3-4). Counsel also learned that Cooper had adamantly refused to change from his jail attire to court clothes. Cooper later told the court that the court clothes burned him. *Id.*

With this development, defense requested further inquiry into Mr. Cooper's competency and informed the court that another evaluation was necessary. (C.H.II 32). Counsel based this request not only upon Cooper's unkempt appearance and recent bizarre behavior, but also upon his mental health history, his family history with schizophrenia, his abject developmental history, his adamant refusal to talk to counsel during the preceding two months, and the opinions of two public defender investigators that Mr. Cooper was a deeply disturbed individual. (C.H.II 26-28, 32-36). During this discussion, Mr. Cooper assumed the fetal position in court. (C.H.II 35).

Later that day a hearing commenced on Mr. Cooper's competency to stand trial. Over the next day and a half, the defense presented several witnesses, lay and expert, who described Mr. Cooper as wholly unable to cooperate with counsel, to participate meaningfully in the proceed-

ings, or even to care appropriately for himself. The defense first called Mr. Cooper to testify. (*See* C.H.II 39-85). He failed to respond to a majority of questions, despite considerable cajoling. (*See, e.g.,* C.H.II 47-49). The questions he did answer indicated that he was afraid of his own counsel. Mr. Cooper repeatedly stated his counsel was trying to kill him and cause him bodily harm. (C.H.II 42-43, 46, 57-61, 71). He accused his lawyer, the prosecutor, and two other persons of trying to choke him with a rope. (C.H.II 57-61). Moreover, his responses to a number of questions had no basis in reality.[1]

During this examination, defense counsel produced a drawing made by Mr. Cooper of "Noryb," a spirit with whom Mr. Cooper claimed to communicate. Counsel agreed to return the drawing if Cooper would let the judge speak with Noryb. During this protracted negotiation, Cooper lapsed into unintelligible speech. (C.H.II 50). He did tell the court Noryb had stopped a conspiratorial attempt to choke him. (C.H.II 59, 62-64). Finally, he became so paranoid and distraught during the questioning regarding Noryb that as defense counsel approached him, he backed up out of the witness chair and fell backwards over the railing, jackknifed between the witness box and the wall, striking his head against the marble wall. (C.H.II 69-70, 84; App. 37-38).[2]

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[1] Mr. Cooper insisted his mother had died a long time ago. (C.H.II 41-42, 52-53). That obviously was not true, as his mother testified during the penalty phase of the trial. (Transcript of Trial [hereinafter "Vol."] XIII 20-52). He believed the case against him had been dismissed and he should be going home; he did not know why he was still in jail. (C.H.II 51). The last time he remembered seeing his brother was thirty years ago; Petitioner at the time was only thirty years of age, although he stated his age to be thirty-seven and claimed he was born around 1978. (C.H.II 53-54). He was not sure, but he thought he had been in prison before for rape. (C.H.II 55). None of his prior convictions were for sexual offenses.

[2] Defense counsel, in his argument to the court, vividly described Mr. Cooper's actions: "We got him back up here in the witness

The defense then presented five county jail inmates' testimony to show that Cooper's behavior during the preceding weeks had been highly unusual. This testimony showed that Cooper cleaned his cell incessantly, moved objects in a highly compulsive fashion, and sprayed disinfectant repeatedly. (C.H.II 86-92). One testified he had seen Cooper stirring his toilet with his hands and talking to himself. (C.H.II 93-104). Another noted Cooper talked to himself in an unintelligible mumble, cleaned "about 10 times a day," and played in the toilet. On one occasion, he saw Cooper rub feces on his face and pour toilet water over his head. (C.H.II 105-15).[3]

During at least a part of the hearing on May 4, 1992 Cooper talked to himself or an imaginary person in an unusual manner. (App. 8; C.H.II 226). Randall Bush, an investigator with the Oklahoma County Police Defender's Office, testified Cooper had been wholly unable to cooperate with efforts to prepare his defense:

> It's been my job to go up and talk to him, try to find out as much about the case as possible so I can help him. I go up to talk to Byron on numerous

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enclave, he's just busted his head, tears are streaming down his eyes and he does not respond in any normal fashion. He starts talking that Noryb is going to be mad at him and that wasn't faking. And I don't think anybody in the courtroom, Marlon Brando in his finest hour could not have faked that under that kind of pain and that kind of trauma, it cannot be done. And he was not responsive to the situation. He should have been mad at me, he should have been mad at you, he should have been mad at the deputies. Instead, he's afraid because he has this fear that Noryb's going to be angry with him." (App. 38).

[3] Another inmate testified to the same behavior, noting that "everybody thinks he's crazy." (C.H.II 123-128). Another inmate who had known Cooper since childhood made several attempts to talk to him. He determined Cooper was "just not the same individual that I've known back through childhood." He saw Cooper clean his cell about 12 times in a three-hour period, mumble to himself, tear up playing cards, and walk in circles around a trash can. (C.H.II 128-136).

> occasions and I get nothing. His pants are on fire, our office is trying to kill him, nothing to help me with his case, nothing that I can use. Nothing.

(C.H.II 140). Bush believed Cooper to be incompetent, and recounted a recent occasion when he took Cooper's brother to visit him. During the visit Cooper gave no indication of recognizing his brother. (C.H.II 137-48).

Dr. Philip Murphy, a licensed clinical psychologist, also testified. (App. 8-26; C.H.II 188-243). He had examined Cooper the evening of the first day of this competency hearing, after observing him that day in court. (App. 10, 12, 15). Prior to the examination, Dr. Murphy had reviewed Cooper's records from Eastern State Hospital and mental health records of his mother. (App. 10-11, 15).

Dr. Murphy reported that these records revealed that when Cooper initially arrived at Eastern State Hospital, two physicians "found him to be severely ill, looking very schizophrenic, thought disorder, very psychotic." (App. 10). During this period, Cooper was initially medicated with Haldol, an antipsychotic drug, and thereafter was placed on antidepressants. (App. 10). While taking the antidepressants, a blood test performed during the hospitalization indicated a low level of a particular metabolite. Dr. Murphy explained this meant Cooper clearly required antidepressants and was "overutilizing" the medication he was receiving. (App. 11). Upon intake, Dr. Murphy reported Cooper was given a rating of 15 as his focal level of functioning, "an extremely low number saying the person's barely functioning at all. . . ." (App. 11). Dr. Murphy recognized some of Cooper's symptoms were put on, but had no doubt that the bizarre behavior and his expressions were not due to malingering. (App. 21-22, 23).[4]

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[4] Dr. Murphy pointed out when the hospital was ready to discharge Petitioner, he told his doctors that he was ready to go back to court: "that part doesn't hold true with just a simple understanding of him [as] a malingerer." (App. 20-21). When the

Dr. Murphy determined that Cooper suffered from a major affective disorder having episodic form, meaning it would wax and wane on its own, particularly when left untreated, even with medication. Dr. Murphy thought Cooper might suffer as well from delayed post-traumatic stress disorder. (C.H.II 223). Thus, he concluded Cooper did not presently possess the ability to assist his counsel effectively. (App. 13, 14, 25, 26). As he explained during cross-examination:

> What I'm saying is that there's a confusion right now that makes it very difficult for anybody who's attempting to get good information back and forth from him and that's what the problem is. That type of confusion is probably linked to this affective disorder, therefore, if we can treat that underlying disorder, hopefully, he'll become less confused and a better person to work with when he works with his attorney.

(App. 21).

Dr. Murphy also discussed the phenomenon of "Noryb," which he felt Cooper truly believed, (App. 13), and found the fear Cooper had for his attorney was genuine and not feigned.

> [By Mr. Mildfelt] You believe he's honestly genuinely afraid of me?
>
> [By Dr. Murphy] Yes, I do believe he is honestly afraid of you.
>
> [By Mr. Mildfelt] You don't think that's any part of any malingering whatsoever?
>
> [By Dr. Murphy] No, that is not malingering.

(App. 13).

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prosecutor suggested the whole of Petitioner's exhibited symptoms could be "because he's really good at malingering," Dr. Murphy totally rejected this notion as impossible. (App. 22). "We're not dealing with an either/or. We're dealing with two things coinciding at the same time." (App. 23).

Dr. Murphy added that the stress of going to court aggravated Cooper's condition and probably added to his "decompensation." He suggested giving Cooper limited doses of anti-anxiety medication prior to court proceedings to reduce the decompensating effect. (App. 14). Dr. Murphy concluded that Cooper was presently incompetent and unable to effectively communicate with counsel. (App. 13, 14, 25, 26). He further opined that Cooper probably could achieve competency, within one month to six weeks if treated aggressively. (App. 26).

The State presented no medical evidence to challenge Dr. Murphy's conclusions. The prosecutor called three jail detention officers, who testified that in the few limited opportunities they had to observe Cooper, they did not see any unusual behavior. (C.H.II 148-65; App. 26-37). Testimony was also presented regarding two federal civil rights lawsuits filed by Cooper several months earlier while acting pro se. (C.H.II 167-81). This information did not affect Dr. Murphy's assessment of his mental status. (App. 24).

At the conclusion of the evidence, the trial court rendered findings as to Mr. Cooper's competence to stand trial. He agreed with defense counsel that Cooper was not normal,[5] found Dr. Murphy to be credible, and accepted his diagnosis.[6] However, he concluded:

> But you know, all things considered, **I suppose it's possible for a client to be in such a predicament that he can't help his lawyers, he can't help his defense,**

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[5] "Well, I think I've used the expression, I know I've talked to Mr. Mildfelt and said in the past that normal is like us. Anybody that's not like us is not normal, so I don't think normal is a proper identification that we are to use within competence. My shirtsleeve opinion of Mr. Cooper is that he's not normal. Now, to say he's not competent is something else." App. 42.

[6] The judge found: "I respect Dr. Murphy and I don't dispute Dr. Murphy's diagnosis . . . From what he observed, he's probably accurate." App. 42-43.

> **and still not be incompetent.** I suppose that's a possibility, too.
>
> I think it's going to take smarter people than me to make a decision here. I'm going to say that **I don't believe he has carried the burden by clear and convincing evidence of his incompetency** and I'm going to say we're ready for trial.

(App. 43) (boldface added).

2. Trial Proceedings

The trial proceedings subsequently commenced. Throughout, Cooper had no interaction with his counsel. He physically pulled away from the counsel he feared, and sat near a corner of the courtroom. At various points of the trial, he would appear to go to sleep, he rested in a fetal position, talked loudly to himself, and otherwise paid little attention to the proceedings. Even after two weeks had elapsed, he had not spoken to either of his counsel. (App. 44-46, 47; Transcript of Trial [hereinafter "Vol."] II 144-50, VI 136, XII 89, XIII 145).

a. The Fifth Exploration of Competency

Toward the end of the State's presentation of evidence, one of the deputies accompanying Cooper in the courtroom notified the trial judge there was "a real heavy odor of feces in the area" and Cooper appeared to have feces in his hand. Both the bailiff and the deputy had seen him eating feces. The court ordered a recess so the deputies could investigate and remove the feces from Cooper's hand. After being told to get cleaned up, Cooper complied by washing his hands and changing his coveralls. He also vomited, apparently involuntarily. (App. 47-48).

Counsel again asked the court for a mistrial and to commit Cooper to a mental hospital, or at least to continue the trial until an independent expert could reevaluate his competency. Counsel renewed their objection to

the standard of proof used in determining competency as well. The trial court summarily denied these requests. (App. 47, 48-49; Vol. VIII 136, 141-44).

The jury found Cooper guilty of murder. During the sentencing phase, evidence was introduced of the sustained abuse Cooper suffered virtually from birth at the hands of those under a duty to protect him: his family, foster homes, and the justice system.[7]

Briefly, the evidence showed Cooper and his siblings were in and out of institutions throughout their childhood. When they were with their mother, she regularly beat them with her hands, and items such as brooms, a hammer, extension cords, a candle holder, and shoes; she even pulled knives on them, and on one occasion shot at them. (Vols. XII 122; XIII 133). Of all the siblings, Mr. Cooper received the harshest beatings because, in his brother's opinion, he looked the most like their dad. (Vol. XII 95, 124). On one occasion his mother beat him with a baseball bat until he could not move. (Vol. XII 124-25). Cooper's uncle described seeing marks on his body from the beatings. (Vol. XIII 100). His sister recalled their mother "always told us that we ought to be dead, that she hated that we were born, and she ought to kill us." (Vol. XII 125).

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[7] Cooper's brother, older sister, uncle, grandmother, and great-aunt testified in great detail to Cooper's childhood, although, as Cooper's brother Ronald declared, they "didn't have very much of a childhood" because they didn't have a father and only "about a third of a mother." (Vol. XII 89-90). Their mother was an alcoholic and had been diagnosed with schizophrenia. (Vol. XII 122-23; C.H.II 32, 199). Their great-aunt observed that when the children were small, "[t]hey lived like animals." That is, they never had food or supervision and they begged for food. There were times when there was no water, electricity or gas in the house. (Vol. XII 136-40). Even when their mother was working in a nursing home, there were times when the family had no food in the refrigerator, only Boone's Farm Liquor. (Vol. XII 101).

When Cooper and his siblings were very small, they were placed in a foster home run by Lillian Spratt. Spratt often put the children outside in pens with her geese, which chased and bit the children; sometimes they were forced to sleep in the geese pens. (Vol. XII 91, 114-15, 121, 138, 144-45). Other times she locked the children in a small closet and left them there all night with a urine pot. (Vol. XII 91). The children subsisted on pork and beans and spaghetti from cans, although Spratt's own children were fed first, and the Cooper children got the scraps. (Vol. XII 91, 120, 137).

When Cooper was four years old, he and his siblings were removed from Spratt's home due to mistreatment and neglect and placed in the Corsicana State Home in Texas in late 1966. (Vol. XIII 120). There the children were told their parents had been killed in a car wreck, which was not true. (Vols. XII 120, 140, 147; XIII 111).

The Cooper children left Corsicana State Home in late 1969 or early 1970, when their mother was married to Lorenzo Williams. Lorenzo was a hard-working man and good stepfather to the children. In early 1974, when Cooper was only eleven years old, his mother shot and killed Lorenzo. (Vols. XII 93; XIII 17, 32). She was acquitted of second degree murder. (Vol. XII 94). Cooper had been close to Lorenzo and changed after his death. (Vol. XIII 8, 86). After Lorenzo's death, their mother literally forced her sons to support the family by stealing. (Vol. XII 124-25). In 1974, Cooper was sent to the Boley State School for Boys, where he stayed until 1978. (Vol. XII 16-17).[8] When Cooper was eighteen

[8] Years later, Boley would be featured in "Oklahoma Shame," a documentary that exposed the mistreatment of children and patients in various Oklahoma institutions during the years 1976-1980. (Vol. XIII 167-69). Some of the abuse occurring at Boley when Petitioner was there consisted of beatings by houseparents. (Vol. XIII 56-57). Larger, more aggressive boys known as "dukes" were allowed to run the dormitories. Dukes protected some boys in exchange for cokes, stereos, allowance money, and the like. Other boys became victims of sexual abuse. (Vol. XII 58-60).

years old, he went to prison where he was sexually abused. A former inmate testified this "really changed him a lot . . . Somebody take your manhood from you, you are lesser. You feel lesser." (Vol. XIII 73).

Dr. Wanda Draper, a developmental psychologist, testified that Byron Cooper, through no fault of his own, was unable to develop a sense of trust; self-confidence; self-worth; the ability to see the world around him and develop relationships; the ability to focus on and complete tasks; and the ability to reflect on his actions. (Vol. XIII 123-24, 132, 141). Of the hundreds of cases Dr. Draper had worked on in her twenty years of experience, she declared Cooper's developmental history to be one of the worst she had ever seen. (Vol. XIII 155-56, 171). After deliberations, the jury voted to impose a sentence of death.

On appeal, the Oklahoma Court of Criminal Appeals held the state law requirement that a defendant show incompetence by clear and convincing evidence did not violate the United States Constitution. The court ruled this "high" standard was appropriate because of the threat of malingering and noted "[a] truly incompetent criminal defendant . . . can prove incompetency with relative ease." (App. 61-62). The appeals court also held that the trial court did not abuse its discretion in determining that Mr. Cooper's evidence fell short of establishing incompetency clearly and convincingly. (App. 64).

SUMMARY OF ARGUMENT

The trial of a person more likely than not incompetent violates principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 202 (1977). The right of a defendant to be tried only if competent is fundamental to our adversary system of justice. History teaches us that the trial of an incompetent has been condemned by civilized society for centuries. Competency to stand trial in England in the 1700s through the present has been judged by the civil standard of proof, a preponderance of evidence standard.

Early American cases and statutes fail to apply a clear and convincing standard of proof on competency determinations. Numerous later cases in the late 1800s and early 1900s enunciated a standard of preponderance of the evidence. This same standard applies in almost all states today and is the appropriate test in all Federal courts by statute.

Unlike the narrow class of cases where an individual's competence is in equipoise, Oklahoma's standard actually contemplates the trial of someone who is more likely than not incompetent. Such a policy has no historical pedigree and obviously fails to adequately protect the fundamental right not to be tried while incompetent. The determination that a defendant is competent to proceed implicates a host of constitutional principles that demand protection commensurate with their fundamental status.

Moreover, application of this standard not only underprotects the fundamental right to be free from trial while incompetent, it also denigrates the sound administration of justice by establishing dual standards for competency, one to stand trial and another for all other competency issues such as competency to enter a guilty plea or waive the assistance of counsel.

The trial of a person more probably than not incompetent is contrary to due process concerns of reliability in the fact-finding process and accuracy of verdicts. The higher the standard of proof applied, the more likely an erroneous finding of competency will be made. This is contrary to the protective purposes behind the clear and convincing standard, to ensure a heightened level of protection for life and liberty interests.

Finally, heightened reliability and accuracy interests in capital sentencing proceedings are undermined by the trial of one more likely than not incompetent. The demeanor of an incompetent person and his inability to provide counsel with vital mitigating evidence prevents a jury from making a reasoned, moral judgment as to his life.

I. THE TRIAL OF A PERSON FOR WHOM THE GREATER WEIGHT OF THE EVIDENCE DEMONSTRATES INCOMPETENCE OFFENDS PRINCIPLES OF JUSTICE SO ROOTED IN THE TRADITIONS AND CONCEPTS AND CONSCIENCE OF OUR PEOPLE AS TO BE RANKED FUNDAMENTAL.

Our Constitution bars trial when a citizen's mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, or to assist in preparing his defense. *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *Medina v. California*, —— U.S. ——, 112 S.Ct. 2572, 2579 (1992). This fundamental right is directly traceable from the genuine concerns for the mentally disabled expressed as early as the fourth century B.C. by Greek and Roman physicians and philosophers. Samuel J. Brakel, John Parry, & Barbara A. Weiner, *The Mentally Disabled and the Law* 9, 9-12 (3d ed. 1985).

These concerns were long ago embraced by English common law. As this Court noted recently:

> Blackstone acknowledged that a defendant "who became 'mad' after the commission of an offense should not be arraigned for it 'because he is not able to plead to it with that advice and caution that he ought,' " and "if he became 'mad' after pleading, he should not be tried, 'for how can he make his defense?' "

Medina v. California, supra, at 2577-78 (*quoting Drope v. Missouri,* 420 U.S. at 171 (*quoting* 4 W. Blackstone, Commentaries *24)); *accord,* 1 M. Hale, *Pleas of the Crown,* *34-*35 (1736).

A rule that allows the state to force a delusional or mentally unfit citizen to stand trial for his life unless he can demonstrate incompetence by clear and convincing evidence cannot be found at common law or throughout the development of the law of this country. Such a rule would have violated the substantive right of the defendant not to be tried while incompetent. This requirement of clear and convincing proof is not a procedural law focusing on the burden of producing evidence, but rather a substantial infringement on the fundamental right not to be tried while incompetent. In *Drope,* 420 U.S. at 172, discussing *Pate v. Robinson,* 383 U.S. 375 (1966), this Court held due process rights are violated where a state fails "to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial." *Id.* at 172. The hearing to determine competency as discussed in *Drope, supra,* and *Pate,* 383 U.S. at 385, is meaningless if the standard of proof is so high that incompetent individuals will be tried. Oklahoma's procedure totally fails to "jealously guard" this fundamental right. *See Pate,* 383 U.S. at 385.

The fundamental right not to be tried while incompetent is violated by Oklahoma's decision to allow the trial of individuals who are more likely than not incompetent. This process fails to adequately protect the defendant's right not to be tried or convicted while incompetent, a

right implicit in any concept of ordered liberty. *Palko v. Connecticut,* 302 U.S. 319 (1937). This standard "offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundmental." *Medina,* 112 S.Ct. at 2577; *Patterson,* 432 U.S. at 202.

A. No Standard of Proof Higher Than Preponderance Was Placed on a Defendant in a Competency Hearing at Common Law.

Unlike the issue of the proper allocation of the burden of proof in competency determinations, for which there was no settled tradition, *Medina,* 112 S.Ct. at 2578, no court at the time of the adoption of our Constitution used a clear and convincing standard in competency determinations. Rather, the common law demanded and applied a preponderance standard of proof. In *R. v. Podola,* 3 All E.R. 418, 429 (1959), a case recognizing that the onus of proof under Section 2 of the Criminal Lunatics Act of 1800 [9] was on the defense, Lord Parker, for the Court of Criminal Appeal, stated:

> In such a case, as in other criminal cases in which the onus of proof rests on the defense, the onus is discharged if the jury are satisfied on the **balance of probabilities** that the accused's insanity basis has been made out.

Id. (emphasis added).[10] The *Podola* court interpreted the instructions given in *R. v. Dyson,* cited in *R. v. Pritchard,*

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[9] The Act codified the treatment of insane persons charged with offenses. "And . . . if any person indicted for any offense shall be insane, and shall upon arraignment be found so to be by a jury lawfully impannelled for that purpose, so that such person cannot be tried upon such indictment, or . . . it shall be lawful for the court before whom any such person shall be brought to be arraigned or tried as aforesaid to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until his Majesty's pleasure shall be known. . . ."

[10] The words "insanity" and "lunacy" and the phrase "incompetency to stand trial" unfortunately have been interchanged for

7 C. & P. at 305n, 307 (1831), which charged the jurors "if they were satisfied that the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane," as a preponderance standard placed on the defendant.

Other early instructions included the jury instruction given in *Ley's Case*, 168 E.R. 1026 (1828) which is another example of the application of the preponderance standard. There, the defendant broke out into incoherent declamations when called upon to enter his plea. Suspecting mental disorder, the court empaneled a jury to try the question of his present sanity. The court instructed the jury that "[i]f there be a doubt as to the prisoner's sanity, and the surgeon says that it is doubtful, you cannot say that he is in a fit state to be put upon his trial." 168 E.R. at 1026. In *Frith's Case*, 22 How. St. Tr. 307 (1790), in determining the level of proof of competency at the time of trial, the court instructed the jury they were to determine "whether he is at this time in a sane or insane state of mind?" *Id.* at 318. These early comments clearly demonstrate a preponderance test or a more likely than not standard.

In *R. v. Carr-Braint*, 2 All E.R. 156 (1943), a case dealing with the Prevention of Corruption Act of 1916, the Court of Criminal Appeal recognized that a rebuttable presumption and the words "unless the contrary is proved" should be construed

> in the same manner as similar words in other statutes, or similar presumptions at common law, for instance, the presumption of sanity in the case of accused person who is setting up the defense of insanity.

several centuries. *Podola* was a case involving competency to stand trial.

Id. at 158. The court agreed with the holding in *Sodeman v. R.*[11], that:

> [t]he burden in cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings. That this is the law is not challenged.

Id. See also 10 Halsbury, *The Laws of England* 437 (3d ed. 1955).

Incompetency to stand trial throughout English history was determined by the same level of proof as civil cases. It is clear that the civil standard was a preponderance of the evidence.[12] *Cooper v. Slade*, 10 Eng. Rep. 1488 (1858). Similarly, the Earl of Halsbury, in his comprehensive work, *The Laws of England*, stated that when the evidence as to the defendant's alleged incompetency is contradictory, "the proper inference to be drawn is that which arises from the general effect and tendency of the whole body of proof on each side of the question." 19 Halsbury, *The Laws of England* 410, para. 844 (1911) (citing cases from 1817 and 1831).

A study of American cases yields the same result. No state statute or state case well into the late twentieth century placed a clear and convincing standard of proof on a defendant to prove he was incompetent to stand trial.

[11] *Sodeman*, 2 All E.R. 1138 (1936) involved the question of sanity at the time of the act.

[12] "This civil standard was noted centuries ago. The authority in question was the judgment of Dyer, C.J., and a majority of the judges of the Common Pleas in *Newis v. Lark*, 2 Plowd. 408 (1571), decided in the reign of Queen Elizabeth. The report contains this passage: 'Where the matter is so far gone that the parties are at issue so that the jury is to give a verdict one way or other, there, if the matter is doubtful, they may found their verdict upon that what appears the *most probable*, and by the same reason that which is *most probable* shall be good evidence.'" *Cited in Carr-Braint*, at 158 (1943) (emphasis added).

Early American cases never demanded a clear and convincing requirement in competency determinations. In *State v. Arnold*, 12 Iowa 479 (1861), the Iowa Supreme Court explained the statutory provisions for proceeding on a claim of incompetency to stand trial, including the standard of proof: "If the verdict is in favor of his sanity, the trial proceeds, if otherwise, the proceedings are to be suspended until he becomes sane." *Id.* at 483. Most early cases refer to the English common law or the Criminal Lunatics Act of 1800 in discussing the origination of their state competency laws.[13] In *Crocker v. State*, 19 N.W. 435, 436 (1884), the Wisconsin court stated:

> Our statute . . . provides that when any person is indicted or informed against for any offense, if the court shall be informed in any manner that there is a probability that such accused person is, at the time of his trial, insane, and thereby incapacitated to act for himself, the court shall, in a summary manner, make inquisition thereof, . . . and if it shall be thereby determined that such accused person is so insane, his trial for such offense shall be postponed indefinitely . . . .

State cases at the turn of the century and into the early twentieth century likewise demonstrate the preponderance standard was the competency standard of proof. "In all cases, although the question may arise in a criminal case, the determination is controlled by the preponderance of the proof." *Jordan v. State*, 135 S.W. 327, 329 (Tenn. 1911). Two early Ohio jury instructions on the defendant's capacity to present facts on his behalf or assist his lawyer demonstrate the only standard at common law. In *Ohio v. Dominick O'Grady*, 5 Ohio Dec. 654, 655 (1896), the court simply stated, "The burden is upon the

[13] *Webber v. Commonwealth of Pennsylvania*, 13 A. 427 (1888), noted the Pennsylvania criminal code of 1860 was almost word-for-word identical to the Criminal Lunatics Act of 1800. *Id.* at 433. *See also People v. McElvaine*, 26 N.E. 929 (N.Y. 1891).

prisoner to show by a preponderance of proof that he is insane." Similarly, the court instructed the jury in *Ohio v. Dominic Tyler*, 7 Ohio N.P. 443 (1898): "I will repeat that—what I mean by the preponderance of the evidence is that the accused must show that he is now at the time of his trial probably not sane."

The Louisiana Supreme Court again stated the applicable law regarding present sanity issues: "At the outset of our inquiry, we are confronted with the presumption of law that every man is presumed to be sane until the contrary is proven by a preponderance of the evidence." *State v. Seminary*, 115 So. 370, 372 (La. 1927); *see also State v. Helm*, 61 S.W. 915 (Ark. 1901). The same preponderance standard was placed on defendants where the competency issue was raised after conviction and prior to sentencing. *See, e.g., People v. Lawson*, 174 P. 885 (Cal. 1918); *State v. Bethune*, 71 S.E. 29 (S.C. 1911); *People v. Geary*, 131 N.E. 65 (Ill. 1921). Nearly 90 years ago, in *United States v. Chisolm*, 149 F. 284 (S.D. Ala. 1906), the court instructed the jury that the defendant bore the burden "to generate a fair reasonable doubt" as to his competency to stand trial, a standard no higher than preponderance.

History thus reveals a salient truth. Almost never—and even then, not until only most recently—has so high a burden been placed on a defendant regarding competency. The settled tradition is to prohibit trial when it is more likely than not the defendant is incompetent.

Even today the overwhelming number of states that specify a burden on the defense utilize a preponderance standard. Indeed, the clear and convincing standard of proof in competency decisions is one of recent vintage.[14]

[14] Contemporary practice is of some significance in determining whether a practice violates due process. *Parke v. Raley*, —— U.S. ——, 113 S.Ct. 517, 528 (1992); *Medina*, 112 S.Ct. at 2578.

Such a weighty burden on a defendant to prove incompetence exists only in Oklahoma and three other states.[15]

Prior to this Court's opinion in *Addington v. Texas*, 441 U.S. 418 (1979), only Pennsylvania had adopted a clear and convincing burden for competency determination.[16] In what looks like a misplaced understanding of this Court's decision in *Addington*, Oklahoma and Connecticut changed their statutes shortly after *Addington* in 1980 or 1981.[17] Wisconsin also changed its statute to clear and convincing shortly after *Addington*[18] but has since rejected this standard for the defendant and only requires a clear and convincing proof if the State desires to commit the defendant, but a preponderance on the State if the defendant raises the issue.[19] Rhode Island only recently required clear and convincing proof in 1993.[20]

Fourteen jurisdictions place the burden of proof specifically on the prosecution.[21] Six states place the burden

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[15] Connecticut, Conn. Gen. Stat. § 54-56d (b) (1981); Oklahoma, Okla. Stat. tit. 22, § 1175.4 (Supp. 1980); Pennsylvania, 50 Pa. Cons. Stat. § 7403(a) (1976); and Rhode Island, R.I. Gen. Laws § 40.1-5.3-3 (1993).

[16] Pennsylvania selected this standard in 1976. 1976 Pa. Laws Act No. 143 § 402.

[17] There is no legislative history that has been located to confirm or deny this statement. 1980 Okla. Sess. Laws Ch. 336 § 4(B); 1981 Conn. Pub. Acts 81-365.

[18] Wis. Stat. § 971.14(4) (1980).

[19] Wis. Stat. § 971.14(4) (1990).

[20] 1993 R.I. Pub. Laws Ch. 5.3 § 40.1-5.3-3.

[21] Alabama, *Lackey v. State*, 615 So.2d 145 (Ala. Crim. App. 1992); Alaska, *McCarlo v. State*, 677 P.2d 1268 (Alaska Ct. App. 1984); Delaware, *Diaz v. State*, 508 A.2d 861 (Del. Super. Ct. 1986); Hawaii, Haw. Rev. Stat. § 704-404, § 704-411 (Supp. 1992); Illinoi, Ill. Rev. Stat. ch. 725, para. 5/104-11(c) (1993); Maryland, *Jolley v. State*, 384 A.2d 91 (Md. 1967); Massachusetts, *Commonwealth v. Crowley*, 471 N.E.2d 353 (Mass. 1984); Mississippi, *Griffin v. State*, 504 So.2d 186 (Miss. 1987); New Hampshire, *State*

on the "moving party" to prove either the competence or incompetence of the defendant by a preponderance of the evidence.[22] Eight states plus the District of Columbia place the burden on the defendant to prove by a preponderance of the evidence that he is incompetent to stand trial.[23] Additionally, three states specify a preponderance of the evidence standard, but do not allocate the burden of proof to the state or to the defendant.[24] Thus, in these thirty-one jurisdictions, the heaviest burden ever placed on the defendant to prove incompetency is that of preponderance.

In two states, decisional law does not allocate a burden to either party, but rather places the responsibility on the trial judge to determine whether he is "satisfied" that the

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v. Zorzy, 622 A.2d 1217 (N.H. 1993); New Jersey, *State v. Otero*, 570 A.2d 503 (N.J. Super. Ct. Law Div. 1989); New York, *People v. Santos*, 349 N.Y.S.2d 439 (2d Dept. 1973); North Dakota, *State v. Heger*, 326 N.W.2d 855 (N.D. 1982); South Dakota, *State v. Jones*, 406 N.W.2d 366 (S.D. 1987); Wisconsin, Wis. Stat. § 971.14 (Supp. 1994 & Supp. II 1995).

[22] California, Cal. Penal Code § 1369(f) (West 1982 & Supp. 1995); Colorado, Colo. Rev. Stat. § 16-8-111(2) (1986 & Supp. 1995); Utah, Utah Code Ann. § 77-15-5(10) (1995); Texas, *Blaylock v. Texas*, 820 S.W.2d 882 (Tex. Ct. App. 1991); Virginia, Va. Code Ann. § 19.2-169.1(E) (Michie 1995); and Wyoming, *Loomer v. Wyoming*, 768 P.2d 1042 (Wyo. 1989).

[23] Arkansas, *Deason v. State*, 562 S.W.2d 79 (Ark. 1978); *State v. Helm*, 61 S.W. 915 (Ark. 1901); District of Columbia, D.C. Code Ann. § 24-301 (1989 & Supp. 1995); Florida, *Flowers v. State*, 353 So.2d 1259 (Fla. App. 1978); Georgia, *Davenport v. State*, 317 S.E.2d 895 (Ga. Ct. App. 1984); Iowa, *State v. Rhode*, 503 N.W.2d 27 (Iowa Ct. App. 1993); Louisiana, *State v. Seminary*, 115 So. 370 (La. 1927); New Mexico, *State v. Chapman*, 721 P.2d 392 (N.M. Ct. App. 1986); Ohio, *State v. Tyler*, 7 Ohio N.P. 443 (1898); Tennessee, *Jordan v. State*, 135 S.W. 327 (Tenn. 1911).

[24] Minnesota, M.S.A. Rules Crim. Proc., Rule 20.01 (1995), West Virginia, W. Va. Code § 27-6A-2(b) (1992 & Supp. 1995), and Washington, Wash. Rev. Code § 10.77.090 (1994).

defendant is competent to stand trial.[25] Research of the remaining 13 states fails to indicate statutory language or case law requiring any sort of clear and convincing finding before one can be adjudicated incompetent.[26] Fundamental notions of due process dictate that high burdens in the law necessarily must be explicitly set forth so that the bearer of the burden may be prepared to meet his burden. This Court has established that

> since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be **calibrated in advance.**

Santosky v. Kramer, 455 U.S. 745, 757 (1982) (emphasis added). Significantly, the federal statute also follows the common law and requires the defendant to prove his incompetence by a preponderance of evidence. 18 U.S.C. § 4241 (1994).

Thus, the only logical and most obvious inference from these practices is that forty-six states and the District of Columbia refuse to place a standard of proof as high and unreliable as clear and convincing to prove incompetency.

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[25] Indiana and Missouri. *See Missouri v. Clark*, 546 S.W.2d 455 (Mo. Ct. App. 1976) (the only burden which exists in an incompetency proceeding rests on the trial judge to satisfy himself that the accused is or is not competent to stand trial); *Wallace v. State*, 486 N.E.2d 445, 454 (Ind. 1985).

[26] Arizona, 17 A.R.S. Rules of Crim. Proc., Rule 11.2 (1987 & Supp. 1995); Idaho, Idaho Code § 18-212 (1972 & Supp. 1995); Kansas, Kan. Stat. Ann. § 22-3302 (1988 & Supp. 1994); Kentucky, Ky. Rev. Stat. Ann. § 504.100 (Michie 1990 & Supp. 1994); Maine, Me. Rev. Stat. Ann. tit. 15, § 101 (West 1964 & Supp. 1994); Michigan, Mich. Comp. Laws § 330.2020 (1970 & Supp. 1995); Montana, Mont. Code Ann. § 46-14-221 (1992 & Supp. 1995); Nebraska, Neb. Rev. Stat. § 29-1823 (1989); Nevada, Nev. Rev. Stat. § 178.415 (1992); North Carolina, N.C. Gen. Stat. § 15A-1002 (1994); Oregon, Or. Rev. Stat. § 161.370 (1993); South Carolina, S.C. Code Ann. § 44-23-410 (Law Co-op 1985 & Supp. 1994); and Vermont, Vt. Stat. Ann. tit. 13, § 4817 (1974 & Supp. 1995).

These contemporary practices support the common law view that a clear and convincing standard to prove incompetency violates the substantive due process right not to submit to trial while incompetent.

B. Fundamental Fairness Prohibits the Trial of an Individual Who Is More Likely Than Not Incompetent.

Mr. Cooper has just demonstrated that history forbids the trial of incompetent individuals and that one is incompetent if the evidence so preponderates. These views reflect the age-old understanding that to try a person who cannot comprehend the proceedings and defend himself is both unfair and unproductive to the ends of justice. *See Dusky v. United States*, 362 U.S. 402 (1960). It is no wonder that history refuses to endorse a standard of proof higher than preponderance. Such an inappropriately high standard would substantially increase the likelihood that constitutionally incompetent defendants would be convicted and in some instances condemned to death.

This Court, in approving allocation of the burden of proof on the defendant in *Medina*, noted:

> Under California law, the allocation of the burden of proof to the defendant will affect competency determinations only in a *narrow class of cases where the evidence is in equipoise*; that is, where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent.

Medina, 112 S.Ct. at 2579. Unlike the California scheme, which had only a marginal effect on the substantive right not to be tried while incompetent, Oklahoma's clear and convincing standard necessarily impacts upon a larger class of people, and guarantees that some who make a strong showing of incompetence and persuade the factfinder he is likely incompetent must nonetheless proceed to trial. At the time of Petitioner's trial, Oklahoma's

standard jury instruction defined the clear and convincing burden of proof followed as follows:

> When I say that a party has the burden of proving any proposition by clear and convincing evidence, I mean that you must be persuaded, considering all the evidence in the case, that the proposition on which the party has this burden of proof is true, and that this conclusion is unmistakable and free from serious or substantial doubt as to its correctness.

Oklahoma Uniform Jury Instructions-Civil 3.2.[27] The trial court's invocation of this stringent standard of proof inappropriately guaranteed that Cooper's strong argument of incompetency would fail because it could not be shown by clear and convincing evidence. App. 42-43.

This Court has repeatedly held that state laws controlling competency procedures must be "adequate" to provide meaningful and reliable safeguarding of an accused's right not to be subjected to criminal prosecution while incompetent. *Medina*, 112 S.Ct. at 2579; *Drope*, 420 U.S. at 172; *Pate*, 383 U.S. at 378. Oklahoma's clear and convincing requirement is unconstitutional because it fails to provide anticipatory, protective procedures which sufficiently minimize the risk that an incompetent person will be subjected to criminal procedures and offends the recognized principles of fundamental fairness. It violates "powerful social standards of progressive society." *Medina*, 112 S.Ct. at 2582 (O'Connor, J., joined by Souter, J., concurring in judgment).

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[27] This instruction was changed by the recent enactment of new civil jury instructions. The instruction now reads "[w]hen I say that a party has the burden of proving any proposition by clear and convincing evidence, I mean that you must be persuaded, considering all the evidence in the case, that the proposition on which the party has this burden of proof is highly probable and free from serious doubt." OUJI-Civil 3.2 (1993).

1. This standard is fundamentally unfair in operation and burdens unwisely the administration of justice.

In *Parke v. Raley*, —— U.S. ——, 113 S.Ct. 517 (1992), this Court rejected a due process challenge to the Kentucky recidivism procedure, and concluded by saying:

> In sum, neither our precedents nor historical or contemporary practice compel the conclusion that Kentucky's burden-shifting rule violates due process, and we cannot say that the rule is fundamentally unfair in its operation.

Id. at 525. *See also Medina*, 112 S.Ct. at 2582 (O'Connor, J., joined by Souter, J., concurring in judgment) ("Against the historical status quo, I read the Court's opinion to allow some weight to be given countervailing considerations of fairness in operation"); *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810, 1817-20 (1992) (Kennedy, J., concurring in judgment).

In determining whether Oklahoma's standard offends due process considerations of fairness in its operation, it is useful to look at the effect this requirement has on the fundamental right not to be tried while incompetent, the reliability of the fact-finding process in determining competency, the ability of a defendant to meet this evidentiary burden in light of the legitimate state concerns about access to evidence and feigning incompetency, and the social cost to the fundamental right not to be tried while incompetent.

No compelling or adequate justification exists for abandoning the common law view that if one is more likely incompetent, he is incompetent. Initially, it is important to realize the State does not have to prove anything to prevail. On the other hand, for the defendant to prevail under a preponderance standard he must prove he is more likely than not incompetent. The defense must garner all available evidence of incompetency and provide the fact-finder with opinions of experts, prior opinions of doctors,

nurses, lay testimony, any other observations, hospital records, and any other relevant evidence.

A preponderance standard also adequately addresses the concerns that an inconclusive examination will unfairly benefit the defendant because such an examination will fall far short of satisfying the defendant's burden. The defendant will have a strong incentive to present all available evidence to the examiner as well as the factfinder, to avoid an inconclusive examination. *Cf. Medina v. California*, 112 S.Ct. at 2582 (O'Connor, J., concurring in judgment). The defendant, to prove incompetence, must persuasively show the factfinder that the greater weight of the evidence shows incompetency. Otherwise the evidence will be in equipoise (or less) and the defendant will not prevail.

In determining whether a clear and convincing standard violates considerations of fairness, it is important to realize like many psychological inquiries, competency evaluations are "in the present state of mental sciences . . . at best a hazardous guess however conscientious." *Solesbee v. Balkcom*, 339 U.S. at 23 (1950) (Frankfurter, J., dissenting); *see also Ake v. Oklahoma*, 470 U.S. 68, 80-81 (1985); *Addington*, 441 U.S. at 430; *Drope*, 420 U.S. at 176; Anthony Highmore, *A Treatise on the Law of Idiocy and Lunacy* 202 (1807) ("nothing is more difficult than to prove the fact of insanity"). The uncertainty of psychological inquiries strongly suggests a clear and convincing standard grossly underprotects the fundamental right to avoid trial while incompetent.

This Court noted in *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958):

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the fact-finder . . . .

In the instant case the trial judge did not dispute the expert's finding of incompetency but concluded that Cooper's overall evidence was not so strong to show his incompetence clearly and convincingly. App. 42-43.

The clear and convincing burden the incompetent must overcome creates an unacceptable risk that this core requirement of due process will be violated and an individual will be tried when he is unable to follow or participate in the proceedings to determine his fate. *Cf. Riggins*, 112 S.Ct. at 1810. Oklahoma has said by this standard that it is better for a person more likely than not incompetent to go to trial than it is for this person to be temporarily sent to a hospital for treatment before he goes to trial.[28]

This Court has long recognized the legitimate prosecution's concern that a defendant might feign incompetence in order to avoid trial. *Medina*, 112 S.Ct. at 2582 (O'Connor, J., concurring in judgment). Yet history has just as long believed that the preponderance standard offered sufficient protection.[29]

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[28] Of course the finding of incompetency is only temporary. In Petitioner's case, the expert concluded that in four to six weeks Petitioner could be restored to competency to the point where he could go to trial. App. 14, 26. Lord Hale recognized the temporary nature of incompetency: "In case a man in a phrenzy happen by some oversight to plead his indictment, and put himself on his trial; and it appeareth to the Court on his trial that he is mad, the judge in discretion may discharge the jury of him; *and remit him to gaol to be tried after the recovery of his understanding* . . . And common sense will at the same time tell us, that the bare postponing a trial under these circumstances, will not discharge the prisoner from a *future trial, when his present disability shall be removed.*" 1 Hale P.C. 35, quoted in *Kinloch's Case*, 18 How. St. Tr. 395, 411 (1746). *See also* M.H. 28; Brakel, *supra* at 701; Group for the Advancement of Psychiatry, 2 *Misuse of Psychiatry in the Criminal Courts: Competency to Stand Trial* 901 (Rep. No. 89, 1974).

[29] The concern is not of recent origin. It has been around for centuries. *See Trial of Charles Bateman*, 11 How. St. Tr. 467 (1685). Pretended madness would be discovered through the com-

Additionally, experts who conduct competency evaluations are well aware of malingering. Dr. Murphy was well aware of the concept of malingering, looked for it during his evaluation of Cooper, and concluded Mr. Cooper was feigning his condition somewhat. App. 12, 17-18. However, Dr. Murphy was firmly of the view that despite incidental malingering, Cooper was nevertheless incompetent to stand trial. Malingering and incompetency to stand trial can be co-existent. App. 16, 18, 21, 23, 25.[30]

Each of the three testifying experts who evaluated Mr. Cooper looked for malingering behavior. Whenever litigation of any sort is involved, "the psychiatrist needs to shift his attitude from not only believing everything the patient says, but to suspecting malingering as well." Ziskin, *Malingering of Psychological Disorders*, 2 Beh. Sci. L. 39, 40 (1984).[31] In fact, exaggeration of symptoms tempts the expert to over-identify competence.[32]

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petency hearing or "inquest". *Id.*; John Brydall, *Non Compos Mentis* 113 (1700).

[30] Arthur T. Meyerson, M.D., *Malingering*, in 2 *Comprehensive Textbook of Psychiatry/V* 1396, 1397 (Harold I. Kaplan, M.D. & Benjamin J. Sadock, M.D. eds., 1989). *See also United States v. Chisolm*, 149 F. 284 (S.D. Ala. 1906); Hay, *Feigned Psychosis—A Review of Simulation of Mental Illness*, 143 Brit. J. Psychiatry 8, 10 (1983) (a study of patients initially diagnosed as feigning psychosis who were later diagnosed as schizophrenic; elevation of one scale on MMPI test may identify malingering but also identifies psychosis and behavioral disorders).

[31] *See also* Resnick, *The Detection of Malingered Mental Illness*, 2 Beh. Sci. L. 21, 28 (1984) (above all, malingering must be suspected in criminal defendants); Resnick, *Malingered Psychosis*, in *Clinical Assessment of Malingering and Deception*, 48-52 (Rogers ed., 1988).

[32] Drob, Berger and Weinstein, *Competency to Stand Trial: A Conceptual Model for Its Proper Assessment*, 15 Bull. Am. Acad. Psychiatry and Law 85, 92 (1987); *see also* Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. L. Rev. 693, 735-36 (1974) (mental health professionals almost always resolve doubtful questions to patient's

The jury instruction given in *United States v. Chisolm*, 149 F. 284 (1906), a present competency case, eloquently discusses feigned mental weaknesses and the possible consequences to society:

> It is proper that I should say to you that the defense of insanity, . . . is frequently resorted to without any just basis. . . . It would be a reproach to justice if a guilty man escaped the penalty for a crime upon a feigned mental irresponsibility, or **postponed his trial** upon a feigned condition of mind, as to his inability to aid in his defense. On the other hand, . . . **it would be likewise a reproach to justice and our institutions, if a human being** 'made in God's own image,' while suffering as the old books put it 'under a visitation of God,' **were compelled to go to trial at a time when he is not sufficiently in possession of his mental faculties to enable him to make a rational and proper defense. The latter would be a more grievous error than the former;** since in the one case an individual would go unwhipped of justice, while in the other the great safeguards which the law adopts in the punishment of crime and the upholding of justice **would be rudely invaded by the tribunal whose sacred duty it is to uphold the law in all its integrity.**

Id. at 288-89 (boldface added).[33]

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disadvantage); Resnick, *Malingered Psychosis*, in *Clinical Assessment of Malingering and Deception* 49 (Rogers ed., 1988) (when condition shows mixture of schizophrenic and antisocial features, mental health professionals may focus only on antisocial traits); Schreiber, Roesch and Golding, *An Evaluation of Procedures for Assessing Competence To Stand Trial*, 15 Bull. Am. Acad. Psychiatry L. 187, 197-98 (1987) (one screening instrument consistently favors finding of competency).

[33] "[T]he possibility of such results must always attend any system devised to ascertain and punish crime, and ought not to induce the court to depart from principles fundamental in criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice." *Davis v. United*

The skepticism that is generally leveled toward a criminal defendant's claim of mental illness, the awareness in the psychiatric and legal communities of the potential for false claims, and the tendency of experts to over-identify competency where some degree of feigning is present offer sufficient protection against abuse of the competency procedure.[34]

Moreover, application of the clear and convincing standard not only underprotects the fundamental right to be free from trial while incompetent, it also ill serves the sound administration of justice because it will require redundant post-trial inquiry into a defendant's competency in numerous circumstances.

Recently, the Court made it clear that the competency to stand trial standard announced in *Dusky*, 362 U.S. 402, governs all other competency issues such as competency to enter a guilty plea, or to waive the assistance of counsel. *Godinez v. Moran*, —— U.S. ——, 113 S.Ct. 2680 (1993). In doing so, the court disapproved of a lower court precedent that required a different and "heightened" competency standard for abandonment of counsel situations:

> Nor do we think a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights.

States, 160 U.S. 469, 492-93 (1895) (insanity at the time of the act).

[34] Additionally, ethical standards place limits on when lawyers can raise an issue of incompetence: "In the absence of good faith doubt that the defendant is competent to stand trial it is improper for either party to move for evaluation. It is improper for either party to use the incompetence process for purposes unrelated to incompetence to stand trial such as to obtain information for mitigation of sentence, to obtain favorable plea negotiation, or to delay the proceedings against the defendant." ABA Criminal Justice Mental Health Standards, Standard 7-4.2(e) (1989).

Id. at 2686.

A defendant who is competent to stand trial under this standard is also competent to waive counsel and to enter a guilty plea. *Id.* Strict adherence to a dual competency standard would have resulted in the court not being able to proceed even though it had found the defendant competent to stand trial. The same dual standard is created where a defendant who is more probably than not incompetent is found competent because a state employs a clear and convincing standard.

Permitting a state to replace the preponderance standard for competency determinations with a more demanding showing will surely generate the very same type of complications disapproved in *Godinez*, particularly in cases where the evidence shows it is more likely than not that the defendant is incompetent. For example, any such defendant who later demonstrates by a preponderance of the evidence that he was not competent to knowingly, voluntarily and intelligently waive his right to trial or counsel is entitled to relief from judgment.[35] Thus, a state court determination of competency, adjudged under the clear and convincing standard, would not be entitled to a presumption of correctness and would have to be disregarded because it is based upon a standard more demanding than the federal one.

[35] For a waiver to be valid under the due process clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In *Moore v. Michigan*, 355 U.S. 155 (1957), this Court determined "that when a judgment of conviction entered in a federal court is collaterally attacked upon the ground that the defendant did not have the benefit of counsel, he has the burden of showing, by a preponderance of the evidence, that he did not have counsel and did not competently and intelligently waive his constitutional right to the assistance of counsel." *Id.* at 161.

2. *An erroneous finding of competency imposes an unacceptable social cost on the fundamental right not to be tried while incompetent.*

As Justice Harlan, in his concurring opinion in *In Re Winship*, 397 U.S. 358, 370 (1970) eloquently wrote:

> . . . in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what probably happened. The intensity of this belief—the degree to which a factfinder is convinced that a given act actually occurred—can, of course, vary. . . . [A] standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases "preponderance of the evidence" and "proof beyond a reasonable doubt" are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

Id.[36]

In *United States v. Fatico*, 438 F.Supp. 388 (E.D.N.Y. 1978), Judge Weinstein attempts to quantify the standards of proof in terms of percentages, placing the preponderance at "50K"% probable; a 70% probability under a clear and convincing standard; an 80% under clear unequivocal and convincing standard; and a 95% probability in proof beyond a reasonable doubt. When a standard of proof is on the defendant, as the probabilities increase there is a corresponding increase in the level of unreliability of the decision. Judge Weinstein, *id.* at 411, then goes on to state:

> If, as suggested earlier in discussing the standard of "clear, unequivocal and convincing evidence," the probability is about 80%, it means we would rather have four cases decided in error against the Government than more than one against the defendant.[37]

Applying this formula to the Oklahoma standard, Oklahoma would rather have four cases decided in error that the defendants were competent than one decided in error that the defendant was incompetent. In light of the fundamental right not to be tried while incompetent, this is clearly unacceptable. *Cf.* 4 W. Blackstone, *The Laws of England*, 358 (T. Wait & Co.) ("It is better that ten guilty persons escape than one innocent person suffer"). The higher the standard of proof placed on an individual to show his incompetence, the probability that he will be found incompetent decreases proportionately at a substantial risk to his fundamental right not to be tried while incompetent. It would be difficult to forget the moral force of our civilized law that absolutely condemns the trial of incompetent persons.

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[36] Justice Harlan goes on to state, ". . . The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each." *Id.* at 371.

[37] Oklahoma's definition of clear and convincing using the word unmistakable is probably equivalent to this standard using unequivocal. This Court has also interpreted the standard "clear, unequivocal and convincing" to be "substantially identical with that required in criminal cases—proof beyond a reasonable doubt." *Klapprott v. United States*, 335 U.S. 601, 612 (1949).

3. *Important constitutional rights of individuals are violated by the Oklahoma standard.*

The high burden that Oklahoma places upon defendants creates an unacceptably high risk that incompetent individuals will be forced to trial. The common law never tolerated so high a risk. Nor did any American jurisdiction during the nineteenth century or the first three-fourths of the twentieth century. Today, neither federal law nor the law of forty-six of the fifty states will tolerate so high a risk. There are compelling reasons for this. The determination that a defendant is competent to proceed implicates a host of constitutional principles that merit protection commensurate with their fundamental status. As Justice Thomas noted for the Court in *Godinez*, 113 S.Ct. at 2686, the defendant who is determined competent to stand trial is an individual who subsequently will face many critical choices of constitutional dimension. He must decide whether to accept the guiding hand of counsel which the Constitution assures him, or to instead waive that right and choose self-representation. *Id.* at 2687. He must decide whether to plead guilty, and thereby waive his fundamental right to a trial. *Id.* at 2686. Additional choices are bound up in that question:

> He will ordinarily have to decide whether to waive his "privilege against compulsory self-incrimination," *Boykin v. Alabama*, 395 U.S. 238, 243 . . . (1969), by taking the witness stand; if the option is available, he may have to decide whether to waive his "right to trial by jury," *ibid.*; and, in consultation with counsel, he may have to decide whether to waive his "right to confront [his] accusers," *ibid.*, by declining to cross-examine witnesses for the prosecution. A defendant who pleads not guilty, moreover, faces still other strategic choices: In consultation with his attorney, he may be called upon to decide, among other things, whether (and how) to put on a defense and whether to raise one or more affirmative defenses.

Godinez, 113 S.Ct. at 2686. By elevating the risk of an erroneous competency determination to unprecedented heights, Oklahoma necessarily has magnified the risk that each and every one of these constitutional choices will suffer.

Other constitutionally significant adverse consequences flow from the placement of so high a burden upon the defendant. Whenever Oklahoma brings to trial under the label of "competent" a defendant who would be adjudged incompetent and unfit for trial under the standards of the common law and the overwhelming majority of American jurisdictions, it places the reliability of the fact-finding process in that case at greater risk of error. It flirts with a significantly greater risk that relevant evidence will elude the factfinder's attention due to the defendant's incompetency and corresponding inabilities to fully participate in the defense and assist counsel. *See, e.g., Thomas v. Kemp*, 796 F.2d 1322 (11th Cir. 1986) (barely competent mentally ill capital defendant's inability to consult with his trial attorney prevented, in part, effective representation). It flirts, as well, with a significantly greater risk that the evidence which does make it before the factfinder will not be tested with the adversarial vigor contemplated by the Sixth and Fourteenth Amendments, again owing to the defendant's incompetency.

As the record in this case regrettably reveals, Oklahoma's severe standard also operates to bring to trial defendants whose appearance and demeanor can irrationally but nonetheless tangibly distort the search for truth, to the ultimate detriment of the presumption of innocence. The jury perceived Mr. Cooper during the trial as totally unconcerned with his fate. He sat curled up in a corner in his orange coveralls, chanting at times, sleeping at times, or just talking to himself. Toward the end of the trial, he ate his own feces. App. 44-49.

Early during voir dire, the dialogue between the court and a juror who insisted she could not be fair and im-

partial because Mr. Cooper looked "creepy" amply demonstrates the unacceptably high risk the trial of the incompetent has on the presumption of innocence. App. 44-45. Even jurors who do not express this verbally are surely thinking it. "From the jury's perspective, the message conveyed by the defense may depend as much on the messenger as on the message itself." *McKaskle v. Wiggins*, 465 U.S. 168, 179 (1984).

Plainly, the outcome of a trial in which the defendant plays no part cannot be considered accurate, and an incompetent cannot conduct a defense either alone or through counsel.[38] It is a proud tradition of our constitutional system that

> [i]n a criminal case . . . the interests of a defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of erroneous judgment.

Addington, 441 U.S. at 423. Oklahoma's decision to place a burden upon the defendant to prove incompetency to stand trial by clear and convincing evidence simply cannot be reconciled with that tradition.

4. *Oklahoma's standard is inconsistent with the protective rationale behind the clear and convincing standard.*

This Court, in cases where the government is a party, has consistently restricted the application of high stand-

[38] "[T]he true reason of the Law I think to be this, a Person of *non sana memoria*, and a Lunatick during his Lunacy, is . . . disabled to make his just Defence, there may be Circumstances lying in his private Knowledg, which would prove his Innocency, of which he can have no advantage, because not known to the Persons who shall take upon them his Defence." *Trial of Charles Bateman*, 11 How. St. Tr. 467, 475 (1685); *Solesbee v. Balkcom*, 339 U.S. 9, 18 (1950) (Frankfurter, J., dissenting); *see* 4 W. Blackstone, *Commentaries*, *24 (1769).

ards of proof, such as the clear and convincing standard, to contexts where particularly important individual interests or rights are at stake. In the words of this Court,

> [t]he interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof.

Addington, 441 U.S. at 424; *see also Santosky*, 455 U.S. at 756.

Addington addressed the issue of involuntary civil commitment to a mental hospital, which, as this Court has long recognized, "constitutes a significant deprivation of liberty that requires due process protection." *Addington*, 441 U.S. at 425. The interest of the individual was to avoid indefinite confinement. *Id.* at 425-36. This Court rejected a preponderance standard because the risk of erroneous commitments would increase, and held that Due Process required the state to justify confinement by proof which is, at a minimum, clear and convincing. *Addington*, 441 U.S. at 427.

Likewise, compelling individual rights were at stake in *Santosky v. Kramer*, 455 U.S. 745 (1982). There, this Court held Due Process requires at a minimum that the state establish parental neglect by clear and convincing evidence before it can completely sever the rights of parents in their natural child. *Santosky*, 455 U.S. at 769-70. In evaluating the respective interests of the parties, the permanence of a decision to terminate was central to this holding. *Id.* at 761. The majority reasoned that the stricter standard would reduce erroneous terminations severely impacting on the individual's interest. *Id.* at 767.[39]

[39] Similarly, actions by the federal government to strip a naturalized immigrant of citizenship and to deport aliens implicate drastic consequences to a resident who "is compelled by our Government to forsake all the bonds formed here and go to a for-

This Court has also upheld the imposition of a clear and convincing requirement where the government sought to protect a compelling individual life or liberty interest. Here again, the purpose of the higher standard is to give greater protection to individuals. In *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 502, 110 S.Ct. 2841 (1990), this Court considered the interest in refusing unwanted medical treatment against the relevant state gainsaying interest in the protection and preservation of human life. While an erroneous decision not to terminate life-support simply results in a maintenance of the status quo (with respect to the patient), an erroneous decision to terminate life-support is not susceptible to correction. 110 S.Ct. at 2854. Ultimately, the fundamental interest in the protection of human life, the irrevocability of an erroneous decision for death, and the nonadversary fact-finding process justified the clear and convincing standard against the petitioner's due process claims.[40] Thus, the clear and convincing requirement served to protect the individual's interests by ensuring that an irrevocable erroneous decision was not made.[41]

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eign land where he often has no contemporary identification." *Woodby v. Immigration and Naturalization Serv.*, 385 U.S. 276, 285 (1966). In these contexts the government must prove facts supporting the denaturalization or deportation by evidence which is "clear and convincing" or "clear, unequivocal, and convincing." *See id.* at 286 (deportation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization); *Schneiderman v. United States*, 320 U.S. 118, 125-26 (1943).

[40] In *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), this Court approved a clear and convincing standard placed on a minor seeking an abortion without parental consent. Again, the finality of an abortion decision and the vulnerability of the minor justify the state application of this standard, especially where the minor was represented by counsel at the ex parte bypass hearing.

[41] This Court has held the clear and convincing standard to apply to citizens under criminal sanctions in only one, vastly different circumstance—when a condemned prisoner alleges, in federal collateral review proceedings, that new evidence proves his death sentence amounts to a miscarriage of justice. *See Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514 (1992). Unlike the pretrial competency determination, federal collateral review implicates weighty comity and finality interests. The Court has since made clear that even in this setting, the clear and convincing standard is inappropriate where actual innocence is at stake. *Schlup v. Delo*, —— U.S. ——, 115 S.Ct. 851, 865 (1995).

Far from ensuring adequate protection for the fundamental right not to be tried while incompetent, the Oklahoma standard exposes it to great risk and assures less reliable determinations. From these holdings, one common theme is obvious: the purpose of requiring a standard of clear and convincing evidence is to ensure a heightened level of protection for certain vulnerable classes of individuals and to provide accuracy of decisions concerning these individuals. They cannot be faithfully read to support the imposition of an unreasonable burden on vulnerable individuals who have a fundamental interest not to be tried while incompetent.

II. THE FUNDAMENTAL RIGHT NOT TO BE TRIED WHILE INCOMPETENT REQUIRES HEIGHTENED RELIABILITY WHERE THE STATE SEEKS TO TAKE A PERSON'S LIFE.

Petitioner has demonstrated in the foregoing proposition that his fundamental right not to be tried while incompetent is violated by requiring him to go to trial even though the greater weight of the evidence shows he is incompetent. The risk to this right is even more acute where one is on trial for his life because the execution of a sentence of death is not "susceptible of correction." *Cruzan*, 110 S.Ct. at 2854.

Well before recognition of the fact that death is qualitatively different, this Court applied greater procedural safeguards under the due process clause for death cases as opposed to non-death cases.[42] "It is the universal ex-

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[42] *Powell v. Alabama*, 287 U.S. 45, 71-72 (1932) recognized a constitutional right to counsel in capital cases only. *See also*

perience in the administration of criminal justice that those charged with capital offenses are granted special considerations." *Griffin v. Illinois,* 351 U.S. 12, 28 (1956) (Burton and Minton, JJ., joined by Reed and Harlan, JJ., dissenting).[43]

Heightened due process concerns in capital cases have been expressed in numerous other decisions in this Court's jurisprudence over the past 30 years.[44] While the trial of a person who by the greater weight of the evidence is incompetent is fundamentally unfair in and of itself, placing a person on trial for his life who by the greater weight of the evidence is incompetent implicates the defendant's fundamental constitutional right to be free from cruel and unusual punishments.

Capital sentencers are required to make a reasoned moral judgment as to an individual's life. *Penry v. Lynaugh,* 492 U.S. 302, 319 (1989) (*quoting California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). An individual's capacity to meaningfully participate in, and react and respond to proceedings and demonstrate remorse or contrition is fundamentally impaired if he is incompetent. Only recently the Court recognized that

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Diaz v. United States, 223 U.S. 442 (1912) (right to presence at trial so important that defendant cannot waive).

[43] This practice has continued after *Gregg v. Georgia,* 428 U.S. 153 (1976). "In capital cases, the finality of the sentence imposed warrants protections that may or may not be required in other cases. Nothing in the Court's opinion reaches non-capital cases." *Ake v. Oklahoma,* 470 U.S. 68, 86 (1985) (Burger, C.J., concurring in judgment).

[44] Due process entitles the defendant to inform the capital sentencing jury by either argument or instruction that he is parole ineligible. *Simmons v. South Carolina,* 512 U.S. ——, 114 S.Ct. 2187, 2201 (1994) (Rehnquist, C.J.; O'Connor and Kennedy, JJ., concurring in judgment); *id.* at 2199 (Ginsburg, J., concurring). *See also Green v. Georgia,* 442 U.S. 95, 97 (1979) (per curiam); *Presnell v. Georgia,* 439 U.S. 14, 16 (1978); *Beck v. Alabama,* 447 U.S. 625 (1980).

> prejudice can be acute during the sentencing phase of the proceeding, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps be determinative of whether the offender lives or dies.

Riggins v. Nevada, 112 U.S. at 1819-20 (1992) (Kennedy, J., concurring in judgment).

As any competent trial lawyer knows, demeanor and trial conduct play an important part in a jury's decision in the trial of a capital case. *See* Geimer and Amsterdam, *Why Jurors Vote Life or Death; Operative Factors in Ten Florida Death Penalty Cases,* 15 Am. J. Crim. L. 1, 51-53 (1987-1988).[45] A mentally incompetent individual's demeanor may be such as to scare the jurors, or indicate apathy toward his situation or lack of remorse toward the victim's family or society. At times during the trial, Mr. Cooper sat in the corner in a fetal position or asleep. At other times he was talking to himself or chanting. It is not hard to imagine the jury's perception of Cooper in his orange coveralls, hair going in every direction, seemingly oblivious to the trial around him. One would naturally

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[45] Geimer surveyed numerous jurors. "About one-third of the jurors interviewed said demeanor was a contributing factor in the sentence recommendation, and one juror attributed the verdict entirely to the defendant's demeanor." *Id.* at 51. One juror noted, "Nobody saw a heartbeat of regret. He didn't move a muscle except for crossing his legs. By the time of the penalty phase, the jury was not inclined to feel sorry for him. Minds were already colored." *Id.* at 52.

The juror who attached the most significance to a defendant's demeanor in this study described his demeanor at trial as callous and indifferent. In another capital case investigated by this study, jurors influenced by the defendant's demeanor described him as 'indifferent to the proceedings' 'passive' 'emotionless' 'no remorse—no anything.' *Id.*

expect some jurors to fear such a defendant and thus vote for death in spite of numerous factors which called for a less severe verdict. The sentencer's decision in a capital case cannot reflect "a reasoned moral response to the defendant's background, character, and crime," *California v. Brown*, 479 U.S. at 545 (O'Connor, J., concurring); *Penry*, 492 U.S. at 319, when an incompetent person's inappropriate demeanor competes with the sentencer's consideration of legitimate sentencing factors. This trial result can hardly be considered reliable.[48]

Aside from the fundamental concerns discussed above, a person who is more likely than not incompetent may not understand or be able to relate the concept of his involvement or involvement of codefendants or general culpability, an important aspect in determining sentencing. The "fundamental misunderstanding of the petitioner's role in the crimes prevented the trial court from considering the 'circumstances of the particular offense' in imposing sentence." *Enmund v. Florida*, 458 U.S. 782, 830 (1982) (O'Connor, J., dissenting) (*quoting Woodson v. North Carolina*, 429 U.S. 280, 304 (1976)).

Recognition and use of mitigating evidence plays a crucial part in the factfinder's determination as to the appropriate penalty. *Lockett v. Ohio*, 438 U.S. 586 (1978). The defendant's ability to assist counsel in finding and presenting mitigation is lessened if not entirely denied when he lacks competence. *See, e.g., Gray v. Lucas*, 677 F.2d 1086, 1094 (5th Cir. 1982) (scope of counsel's duty to investigate mitigation witnesses limited by defendant's refusal to identify witnesses). The best, and sometimes only, source of mitigating factors is often the defendant himself. A defendant can provide information known solely to himself only if he is able to understand the concept of mitigation and assist counsel. An individual who more probably than not is incompetent cannot give necessary information to counsel to use to convince the jury to spare his life.

[48] "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment in any capital case." *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (citations and internal quotation marks omitted).

Cooperation with and trust in counsel are also necessary not only in obtaining and offering mitigating evidence, but essential to decisions to testify, plea bargain, waive jury at penalty stage, and put on mitigating evidence. *Wallace v. State*, 893 P.2d 504 (Okla. Crim. App. 1995); *Silagy v. Peters*, 905 F.2d 986, 1008 (7th Cir. 1990) (one can choose to forego the presentation of mitigating evidence even over the contrary advice of counsel and warning of the court). One who is more likely than not incompetent cannot make the informed choices necessary to adequately defend himself at a capital murder trial.

The trial of an individual who is more probably than not incompetent encompasses a litany of constitutional issues at both the guilt and punishment stages of a capital trial as demonstrated herein. This standard diminishes the reliability of the sentencing determination, creates a clearly avoidable risk the death penalty might be imposed in spite of factors which call for a less severe sentence, and creates a spectacle of the trial wherein the person is forced to trial even though he is more likely than not incompetent. Such a spectacle, condemned since common law, totally violates the fundamental right not to be tried while incompetent.

CONCLUSION

Oklahoma's use of the clear and convincing standard to determine competency to stand trial in a capital case violates the Eighth and Fourteenth Amendments. For the reasons stated in the foregoing brief, Petitioner respectfully requests this Court reverse and remand his case for a new trial.

Respectfully submitted,

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QUESTION PRESENTED

1. Whether it is constitutional for a state to require a criminal defendant to sustain his claim of incompetency by clear and convincing evidence.

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IN THE SUPREME COURT
OF THE UNITED STATES

BYRON KEITH COOPER,	)	
Petitioner,	)	
v.	)	**Case No. 95-5207**
THE STATE OF OKLAHOMA,	)	
Respondent.	)	

STATEMENT OF THE CASE

Petitioner, Byron Keith Cooper, was charged on December 4, 1989 with first degree murder for the stabbing death of Harold Sheppard during the commission of a burglary in violation of Okla.Stat.tit. 21, § 701.7 (1991) in Case No. CF-82-5084 in the District Court of Oklahoma County before the Honorable Richard W. Freeman, District Judge. Petitioner was represented by counsel. The jury returned a verdict of guilty and, after a sentencing stage proceeding, found the existence of five (5) aggravating circumstances: that Petitioner had previously been convicted of a felony involving violence; that the murder was committed to avoid arrest or lawful prosecution; that the murder was especially heinous, atrocious, or cruel; that the murder was committed by one serving a term of imprisonment; and the existence of a probability that Petitioner would pose a continuing threat to society. The jury then recommended a sentence of death. The trial court

sentenced Petitioner in accordance with the jury's verdict.

From this Judgment and Sentence, Petitioner perfected his appeal to the Oklahoma Court of Criminal Appeals. On January 10, 1995, the Oklahoma Court of Criminal Appeals issued an opinion affirming Petitioner's conviction in Cooper v. State, 889 P.2d 293 (Okla. Crim. App. 1995). Rehearing was denied February 13, 1995. On October 5, 1995, this Court granted certiorari review.

STATEMENT OF THE FACTS

On September 8, 1989, the body of Harold Sheppard was found in his home at Northeast 13th and Fonshill streets in Oklahoma City, Oklahoma (Tr. V 28). Based on interviews with people in the neighborhood, authorities estimated that Sheppard was stabbed to death September 4, 1989 (Tr. V 177). Petitioner became a suspect after using Mr. Sheppard's J.C.Penney card (Tr. V 171-172, 177). Petitioner initially admitted murdering Mr. Sheppard but later retracted the admission (Tr. VIII 111, 114-15). A watch and two cameras belonging to Mr. Sheppard were found in the home where Petitioner had been staying (Tr. V 224, 230-231). At Mr. Sheppard's house, authorities found Petitioner's fingerprints on a flashlight, a metal can, a watch case and a carton of cigarettes (Tr. VIII 35-38). Petitioner's prints were also found on the charge receipt he signed at the J.C. Penney store at Shepherd Mall (Tr. VIII 42, 45). A butcher knife was found in the kitchen of Mr. Sheppard's home. When treated with a chemical agent, the knife contained stains which were determined to be consistent with the presence of blood and marks which appeared someone

wiped the knife clean (Tr. VI 234-35, 244, 247).

HISTORICAL FACTS REGARDING COMPETENCY

In August of 1990, Petitioner's counsel filed an Application for Determination of Competency. The district court found that there was a doubt as to Petitioner's competency and issued an order directing that Petitioner be examined in the county jail to determine competency to stand trial (Record 336-37, 344-45).

On August 27, 1990, a post-examination competency hearing was scheduled in the District Court of Oklahoma County. While there is no transcript or record of a hearing, an order was entered reciting that a hearing was held and there was a finding of incompetency on that date. Petitioner was committed to Eastern State Hospital for further evaluation and treatment.

The parties appeared for a post-examination competency hearing on December 20, 1990, after Petitioner's return from Eastern State Hospital. The defendant called Dr. Edith King, a clinical psychologist who had received an order to examine Petitioner Cooper on August 8, 1990 (Transcript of Competency Hearing of December 20, 1990 and January 18, 1991, hereinafter "C.H.I" 4). Dr. King had examined Petitioner in the Oklahoma County Jail for "close to an hour" prior to Petitioner's commitment to Eastern State Hospital (C.H.I 12).

At the time of Dr. King's examination, Petitioner did not answer the required statutory questions to her satisfaction.

Petitioner said he was charged with "burglary or kidnapping or something". He denied that he was charged with murder, stating that his attorney had "said something about it" but that he was "only kidding" (C.H.I 5-6). Petitioner did not speak in a rational manner and was unable or unwilling to answer specific questions.

Dr. King's opinion was Petitioner was not able to communicate with his attorney at that time. She was of the opinion that he was displaying a thought disorder and possibly auditory hallucinations that would be treatable within a reasonable length of time (C.H.I 6-7). Dr. King considered Petitioner to be mentally disturbed and a danger to himself or others (C.H.I 8-9).

Dr. King testified at the hearing that there were times in her experience when she has thought a defendant was malingering but recommended further evaluation "just to be safe". (C.H.I 15). In order to determine whether one is in fact malingering, Dr. King testified they had to be observed for a longer period of time (C.H.I 16).

Dr. King admitted that she did not do a diagnosis of Petitioner and that if she were doing the diagnosis, she would do it very differently from her initial observation (C.H.I 21). At the time of the competency hearing in December, Dr. King had not seen Petitioner since August (C.H.I 10).

Dr. King reviewed the report prepared by Dr. Jeanne Russell at Eastern State Hospital and testified that there was nothing about her examination of Petitioner back in August

that would cause her to disagree with Dr. Russell's conclusions (C.H.I 27). Based on her discussion with Petitioner prior to the hearing, Dr. King felt that Petitioner had improved since August. He no longer had a "wide-eyed look" and seemed to be oriented and in touch (C.H.I 27).

At the conclusion of Dr. King's testimony, the State contended that the defense had failed to meet their burden to show by clear and convincing evidence that Petitioner Cooper was incompetent on that day. The prosecutor, however, asked the court to reserve any ruling until the State's psychologist testified (C.H.I 30-31).

The hearing continued on January 18, 1991, and the State presented the testimony of Dr. Jeanne Russell, a forensic psychologist working for Eastern State Hospital. Dr. Russell had a doctorate in counselling psychology and had approximately 15 years with the Department of Corrections (C.H.I 34).

Dr. Russell conducted her first interview of Petitioner Cooper on November 16, 1990 after Petitioner's admittance on August 28, 1990 (C.H.I 54). Dr. Russell's evaluation took a total of six hours including review of records and observation of Petitioner (C.H.I 99). Cooper denied knowing what his charges were, what his birthdate was, who his attorney what his role was. Petitioner told Dr. Russell about an invisible friend that he had and when she pressed him for more information, he declined to give it (C.H.I 38).

Dr. Russell reviewed the hospital records, talked with the staff who worked with Petitioner on a daily basis, and talked

with employees of the Department of Corrections where he was incarcerated prior to his current charges to look for any history of mental illness and observed him. She determined that he did not have a history of mental illness or a history of hallucinations or delusions (C.H.I 39).

Dr. Russell was of the opinion that Petitioner had more knowledge of his defense than he was telling her (C.H. I 40). On at least four occasions he expressed an understanding of the courtroom procedures, and stated that he knew what his charges were and that he was aware of what the consequences could be (C.H. I 41). He also had expressed to staff an interest in a plea of not guilty by reason of insanity (C.H.I 41). On October 10, Cooper stated, "You're wasting your time going over courtroom proceedings with me. I know them. I've already spent 10 calendar years behind bars" (C.H.I 41). Petitioner would not discuss his charges with staff but told one of his peers, "I've got nothing to lose, I've already got two murder raps on me". (C.H.I 58). On October 10, 1990, Petitioner stated that he was willing to discuss his charges and demonstrated an understanding of courtroom procedures. He stated he wanted to return to stand trial (C.H.I 59).

Dr. Russell's opinion was that Petitioner was able to appreciate the nature of the charges against him and could consult and assist his attorney in his defense (C.H.I 43-44). Dr. Russell did not believe Petitioner was mentally ill and was of the opinion that he was a danger due to his past behavior; not his mental state (C.H.I 44-45).

Dr. Russell began to get suspicious of Petitioner when he

did not know his date of birth (C.H.I 73). Petitioner said he used all kinds of drugs including "acid, weed, mushrooms, paints, cocaine, crank and valium" (C.H.I 78).

Dr. Russell's opinion was Petitioner was malingering. Her conclusion was based on the overall interview and review of records, not one particular set of answers (C.H.I 88).

Based on the testimony presented at the hearing, the district court found Petitioner competent to stand trial (C.H.I 101).

Over a year later, Petitioner's counsel again raised the issue of incompetence. Counsel stated that he was concerned about Petitioner's behavior in the courtroom and in the county jail (App. 3). Counsel admitted and reiterated at that time that Petitioner might be faking (App. 4). The district court refused to revisit the competency issue at that time (App. 6).

On the first day of trial, Petitioner again exhibited what was termed strange behavior. He refused to change from his orange jail coveralls because his trial clothes were "burning him" (Transcript of Pre-Trial Motions and Competency Hearing May 4 and 5, 1992, hereinafter "C.H.II" 3). He appeared with his right hand bandaged and had a large bandage on his neck (C.H.II 4).

Tony Albertson, a jail deputy, had escorted Petitioner to preliminary hearing a month earlier. At that time, Mr. Albertson spent about an hour with Petitioner. They had

conversed and Petitioner did not have any difficulty understanding what was going on around him (C.H.II 7-8).

Defense counsel reiterated that he had previously thought Petitioner was malingering and might still feel the same way (C.H. II 26). However, two investigators from his office felt that Petitioner was incompetent as Petitioner was not communicating with them or with his attorney (C.H.II 26).

Based on representations by defense counsel, the court determined that another evaluation was necessary. Counsel waived the right to demand a jury trial, secured a psychiatrist to examine Petitioner and began presenting witnesses that afternoon (C.H. II 36, 41).

Petitioner testified that his attorney, Bob Mildfelt, was trying to kill him (C.H.II 42). Petitioner refused to allow his attorney to stand close to him (C.H.II 44). Petitioner talked about a spirit named "Noryb"[1] who advised him about the charges against him. Petitioner agreed to let the judge talk to Noryb and after speaking unintelligibly, reported that Noryb would not talk to him (C.H.II 50).

The defense presented several inmates from the Oklahoma County Jail who testified that they noticed Petitioner's behavior, including stirring his hands in the toilet in his cell (C.H.II 93-94, 105, 106, 116).

Randy Bush, an investigator with the Oklahoma County

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[1] "Noryb" is Petitioner's first name "Byron" in reverse, a fact either unnoticed or unmentioned by the witnesses and parties.

Public Defender's Office, testified that Petitioner would not communicate about the case with him (C.H.II 140).

Dr. Philip Murphy, a licensed clinical psychologist, examined Petitioner in the evening hours of May 4, 1992 (App. 10; C.H.II 189). Dr. Murphy reviewed the Eastern State Hospital records and noticed that a nurse had described Cooper as "world-class, first-class manipulator" (App. 10; C.H.II 190-191). Dr. Murphy testified that some part of Petitioner's behavior was due to malingering and that he was "attempting to look worse than he is" (C.H.II 193). Murphy thought Petitioner had a thought disorder and although Petitioner showed no structural problems in his thinking, Murphy thought him to be incompetent because he was "confused" and could not assist his attorney (App. 12-13, C.H.II 194).

Dr. Murphy was unable to tell whether Petitioner's apparent playing with feces was an effect of the disorder or part of the malingering (App. 16; C.H. II 201). Dr. Murphy admitted that part of Petitioner's actions were the product of malingering (App. 17; C.H.II 204, 227).

The State presented the testimony of jail employees. JoDon Clanton, a detention officer at the Oklahoma County Detention Center, had several conversations with Petitioner Cooper. They would discuss what happened that day or what was going on in the news or on television. Mr. Clanton had never been given reason to believe that Cooper did not know what was going on around him (C.H.II 152).

Charles Morehead testified that in the five months he had

worked at the Oklahoma County Jail there, he had interacted with Petitioner about twenty times and had never observed him to act in an unusual way (App. 28; C.H. II 246). When Mr. Morehead had talked with Petitioner earlier that same day, Petitioner had no trouble communicating with him. Morehead had an earlier discussion with Petitioner about a fight Petitioner had been in with another inmate. Petitioner told Morehead he and the other inmate had made up and everything was cool (App. 30-31; C.H.II 250).

Steve Carrell from the Oklahoma County Sheriff's Department had come into contact with Petitioner six to eight times. He had observed Cooper that week walking around, conversing with other inmates and drinking coffee. Mr. Carrell had never seen Petitioner act out of the ordinary (App. 34-34; C.H.II 256-257). They had a discussion about a fight Petitioner had been in and Petitioner was able to answer Carrell's questions without requiring them to be repeated (App. 35; C.H.II 257).

Assistant District Attorney John Jacobsen testified that Petitioner had filed two civil rights lawsuits, one in October of 1991 and one on January 30, 1992. They were handwritten pro se pleadings (C.H.II 167-173). J. Michael Hull, a forensic document examiner with the Oklahoma City Police Department, compared the handwriting on the federal court pleadings with known handwriting samples of Petitioner Cooper (C.H.II 184). He was of the opinion that the signatures were of common authorship (C.H.II 185).

Assistant District Attorney Brad Miller informed the court that as recently as nineteen days earlier, on April 15,

1992, Petitioner had coherently talked about his testimony in another criminal case in court (C.H. II 267). Petitioner had also written the trial judge a letter (Record 1089-1091). Dr. Murphy was of the opinion that Petitioner was malingering when he wrote the letter (C.H. II 239).

The court stated that he respected Dr. Murphy and did not dispute his diagnosis but that the defense had not met the burden of proving Petitioner's incompetency by clear and convincing evidence (App. 42-43; C.H.II 271-272).

When court resumed on May 5, 1992, counsel for Petitioner announced not ready for trial because his client was not communicating with him. The trial court overruled defense counsel and the trial began (App. 44; C.H.II 9-10).

During trial, the subject of Petitioner's competency arose again. Deputy William Grimsley noticed Petitioner had something in his hand that "looked like candy" and there was a heavy odor of feces in the area (Transcript of Trial Proceeding, Volume VIII, hereinafter referred to as "Tr. VIII" 135). The court ordered a recess and directed the deputies to clean Petitioner up and bring him back down to court (Tr. VIII 137). Deputy Grimsley testified that the material extracted from Petitioner's hand had an odor of human feces to it (Tr. VIII 138). After Petitioner threw up in his cell, he put his own bandage back on his hand and returned to court (Tr. VIII 139-141).

Defense counsel moved for a mistrial and asked that an independent expert be appointed to advise the court as to Petitioner's competency (Tr. VIII 142). The court overruled

the motion and the trial proceeded.

SUMMARY OF THE ARGUMENT

In 1980, the State of Oklahoma adopted a set of statutes to govern procedures for determining a criminal defendant's competency to stand trial. Okla.Stat.tit. 22, § 1175.4 (1991) provides that once it is determined there is doubt as to the defendant's competency, a defendant is evaluated. Thereafter, a post-examination competency hearing is held. At that hearing, the court shall determine, by clear and convincing evidence, if the person is incompetent. The party who raises the issues shall bear the burden.

Petitioner claims the clear and convincing standard adopted by Oklahoma and utilized in this case violates due process as it allows the trial of a person "more likely than not incompetent". That a factually incompetent defendant shall not be subjected to trial is a principle of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental". Medina v. California, 505 U.S. 437, 112 S.Ct 2572 (1992).

Every defendant is presumed competent to stand trial and while this Court has determined that incompetent defendants should not proceed to trial, the Court has not allocated to the states the manner in which incompetency is to be determined. States are free to adopt their own standards of proof consistent with their own concepts of public policy and fairness.

Although due process requires basic procedural

safeguards be observed, balancing of society's interest against those of the accused has been left to the legislative branch. The clear and convincing intermediate level of proof adopted by the Oklahoma Legislature is sufficient to protect the values of society and is an accurate reflection of how the risk of error should be distributed between the litigants.

I.

THE CONSTITUTION PROTECTS A CRIMINAL DEFENDANT FROM BEING TRIED WHILE INCOMPETENT; THE DUE PROCESS PROVIDED TO DETERMINE INCOMPETENCE IS LEFT TO THE STATES.

At the core of our criminal justice system is a presumption that every defendant is competent to stand trial. Medina v. California, 505 U.S. 437, 112 S.Ct. 2572 (1992). It is only when a defendant's mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, or to assist in preparing his defense, that he is exempted from being tried. Drope v. Missouri, 420 U.S. 162, 171 (1975), Pate v. Robinson, 383 U.S. 375 (1966). While this Court has determined that incompetent defendants should not proceed to trial, it has not directed the states as to the manner in which to determine incompetency. This Court has held the allocation of the burden of proof to a criminal defendant to prove incompetence does not violate due process. Medina, 112 S.Ct. at 2577.

A defendant not only has a right not to be tried while incompetent, he also has a right not to be committed without due process. It is clear that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection". Jones v. United States, 463 U.S. 354, 361 (1983), quoting Addington v. Texas, 441 U.S. 418, 425 (1979). Therefore, a state must have a constitutionally adequate purpose for the confinement. Jones, 463 U.S. at 361.

Oklahoma has balanced these concerns in the adoption of its competency statutes. Okla.Stat.tit. 22, § 1175.1 (Supp. 1992) defines competency as "the present ability of a person arrested for or charged with a crime to understand the nature of the charges and proceedings brought against him, and to effectively and rationally assist in his defense".

Under Oklahoma law, the question of the incompetence of a person may be raised by the person, the defense attorney, or the district attorney, by an application for determination of competency. The court may also initiate a competency determination on its own motion and direct the processing of the application. Okla.Stat.tit. 22, § 1175.2(A).

The application shall allege that the person is incompetent to undergo further proceedings, and shall state facts sufficient to raise a doubt as to the competency of the person. Okla.Stat. tit. 22, § 1175.2 (1991). The court shall hold a hearing on the application and, if the court finds there is a doubt as to the competency of the defendant, the court shall order the person to be examined by "doctors or

appropriate technicians". Okla.Stat. tit. 22, § 1175.3 (Supp. 1993).

These medical health professions are required to answer a series of five questions:

1. Is this person able to appreciate the nature of the charges against him?

2. Is this person able to consult with his lawyer and rationally assist in the preparation of his defense?

3. If the answer to question 1 or 2 is no, can the person attain competency within a reasonable time if provided with a course of treatment, therapy or training?

4. Is the person a mentally ill person or a person requiring treatment as defined by Section 3 of Title 43A?

5. If the person were released without treatment, therapy or training, would he probably pose a significant threat to the life or safety of himself or others?
Okla.Stat.tit. 22, § 1175.3 (Supp. 1993).

After these determinations are made, a hearing on the competency of the person shall be held. The court, at the hearing on the application, shall determine, by clear and convincing evidence, if the person is incompetent. If incompetency is found, the criminal proceedings are enjoined and remain enjoined absent a future finding that competency has been restored.

Oklahoma statutes provide extensive protections for the criminal defendant at this hearing. The person whose competency is in question shall have the right to be present at the hearing and shall have the right to cross-examine witnesses. No statement made by the accused shall be used against him in any criminal proceeding then filed or filed in the future but may only be used for impeachment. The accused may demand a jury trial. Okla.Stat.tit. 22, § 1175.4 (1991). The jury, or the court shall answer the following questions:

1. Is the person incompetent to undergo further criminal proceedings at that time? If the answer is no, criminal proceedings shall be resumed. If the answer is yes, the following question shall be answered.

2. Can the incompetency of the person be corrected within a reasonable period of time, as defined by the court, by treatment, therapy or training? If the answer is yes, the court shall make the appropriate order. If the answer is no, the following questions shall be answered.

3. Is the person mentally ill, mentally retarded or a person requiring treatment as defined by Section 3 of Title 43A?

4. Is the person a threat to the safety of himself or others if released?

Okla.Stat.tit. 22, § 1175.5 (1991).

If the person is found to be competent, the criminal

proceedings shall be resumed. If the person is found to be incompetent but capable of achieving competency, the court shall remand the person to the Department of Mental Health, the Department of Human Services, other appropriate state agencies or a private care provider for appropriate treatment, therapy, or training. If the person is found to be incompetent, unable of achieving competency, and in need of treatment, the court shall order treatment and suspend the criminal proceeding. If the person is incompetent and unable of achieving competency but does not require treatment and is not a threat to himself or society, the court shall remand the person to the Department of Human Services for assistance. That agency shall make periodic reports to the court as to the status and activities of the person.

Okla.Stat.tit. 22, § 1175.6 (1991).

Oklahoma's competency statutes make specific provisions for those arrested with a criminal offense which is punishable by death, life imprisonment or life imprisonment without parole, who are found to be incompetent. Section 1175.6 (B) provides that those persons are subject to being placed in a maximum security ward of the mental health facility designated by the Department of Mental Health and Substance Abuse services until the person is adjudicated to be competent or is adjudicated no longer to be a threat to any other person.

This Court has said the states must "observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial". Drope, 420 U.S. at 172. This Court has not stated what those

procedures must entail. Oklahoma's procedures are specifically designed to afford the accused due process of law and to ensure that he is capable of making a rational defense prior to being tried for the crime for which he is accused while at the same time protecting the state's inherent interest in the orderly progression of its judicial process.

Petitioner claims Oklahoma's standard of "clear and convincing evidence" is so high that it fails to protect a defendant who is "more likely than not" incompetent. This Court has not held, and the Constitution does not provide, that a defendant who is "more likely than not" incompetent may not be tried. The exemption from trial only applies to those defendants who are in fact incompetent. In Dusky v. United States, 362 U.S. 402 (1960), this Court reiterated the standard which has been followed since and which the Oklahoma court adheres to, that "the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him". Notably, this standard is not whether the defendant, more likely than not, has sufficient present ability to consult with the lawyer or whether the defendant, more likely than not, has a rational as well as factual understanding of the proceedings against him.

"Clear and convincing" is a intermediate level burden designed to balance the interests of the parties - mere preponderance establishes only a likelihood with limited reliability in the result. See Addington v. Texas, 441 U.S. 418, 423 (1979). In Addington, this Court noted that there are three standards or levels of proof for different types of

cases. At one end is the typical civil case involving a monetary dispute between parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error.

On the other hand, the interest of the defendant in a criminal case are so great that they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. This is accomplished by requiring that the state prove the guilt of an accused beyond a reasonable doubt. In Re Winship, 397 U.S. 358 (1970).

The clear and convincing standard, however, is an intermediate standard typically used in those civil cases where the interests at stake are deemed to be more substantial than mere loss of money. Addington, 441 U.S. at 424. Although there is no empirical data on how jurors understand these differing standards of proof, "the standard of proof [at a minimum] reflects the value society places on individual liberty". Addington, 441 U.S. at 425.

In Medina v. California, 112 S.Ct. at 2577, this Court was unable to say that allocation of the burden of proof to a criminal defendant to prove incompetence "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". Patterson, 432 U.S. at 202. The court noted that there is no settled tradition on the proper allocation of the burden of proof in a proceeding to determine competence. The Court held that once a state provides a defendant access to procedures for

making a competency evaluation, there is no basis for holding that due process further requires the state to assume the burden of vindicating the defendant's constitutional rights by persuading the trier of fact that the defendant is competent to stand trial. Medina, 112 S.Ct. at 2579. Medina need not be extended any further than its own rationale to come to the conclusion that it is not unconstitutional to require the defendant to bear the burden of proving incompetency by clear and convincing evidence.

"Due Process" has been defined in a variety of ways depending upon the facts and circumstances of each particular case. It is clear that "beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation". Medina, 112 S.Ct. at 2576. The category of infractions that violate "fundamental fairness" has been defined very narrowly. Id. In United States v. Lovasco, 431 U.S. 783, 790 (1977), this Court held:

> Judges are not free, in defining 'due process' to impose on law enforcement officials [their] 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function' Rochin v. California, 342 U.S. 165, 170, [96 L.Ed 183, 72 S.Ct. 205, 25 ALR2d 1396] (1952) . . . [They] are to determine only whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' Mooney v. Holohan, 294 U.S. 103, 112 [79 L.Ed. 791, 55 S.Ct. 240, 98 ALR 406] (1935), and which defines 'the community's sense of fair play and decency,' Rochin v. California, supra, at 173 [96 L.Ed 183, 72 S.Ct. 205, 25 ALR2D 1396]

As Oklahoma's statute protects the constitutional right of a person not to be tried while incompetent, it does not violate fundamental concepts of justice or the community's senses of fair play and decency and is not violative of the Due Process Clause of the United States Constitution.

A.

THE INCREASED PROTECTIONS AFFORDED CRIMINAL DEFENDANTS IN COMPETENCY PROCEEDINGS FAVOR A STANDARD OF PROOF HIGHER THAN MERE PREPONDERANCE.

Petitioner argues that the common law demanded and applied a preponderance of the evidence burden of proof for determining competency to stand trial. If true, however, this does not compel such a result today. In Burnham v. Superior Court of California, 495 U.S. 604 (1990), this Court noted that a process of law which can show the sanction of settled usage both in England and in this county must be taken to be due process of law. However, "it by no means follows that nothing else can be due process of law". Burnham, 495 U.S. at 619, quoting Hurtado v. California, 110 U.S. 516 (1884). To hold that such a characteristic is essential to due process would be to "deny every quality of the law but its age, and to render it incapable of progress or improvement". "It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians". Id.

The developments of today's legal system do not dictate that such a "preponderance of the evidence" standard be in place today. In today's criminal justice system, criminal defendants are represented by attorneys skilled in the practice of criminal law and are provided with psychiatric experts, funded at the expense of the state. See Ake v. Oklahoma, 470 U.S. 68 (1985). These safeguards, which were not in existence at common law, serve to protect the interest of a defendant not to be tried while incompetent. Thus, the "settled tradition" of the past, if it exists, is no longer controlling.

This Court recognized in Ohio v. Akron Reproduction, 497 U.S. at 517-518, that the implementing of certain safeguards can justify a different standard of proof. In Akron, the minor seeking an abortion was assisted in the courtroom by an attorney as well as a guardian ad litem. These factors were found to contribute to the higher standard of proof placed on the minor. This Court also realized in Medina that once a competency hearing is held, the defendant is entitled to the assistance of counsel and psychiatric evidence is brought to bear on the questions of the defendant's mental condition. The Court noted:

> Although an impaired defendant might be limited in his ability to assist counsel in demonstrating incompetence, the defendant's inability to assist counsel can, in and of itself, constituted probative evidence of incompetence.

Medina, 112 S.Ct. at 2580. States may take such factors into account in making judgments as to the allocation of the burden of proof. Id.

Similarly, the fact that psychiatry is not an exact science

does not demand that the state bear the burden of proof. Id. "The Due Process Clause does not, however, require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused". Id. It is enough that the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial. Id.

Legislatures, like courts, are free to depart from common law concepts, adjusting outmoded rules of law to modern conditions. Fisher v. United States, 328 U.S. 463, 476 (1946). See also Burnham, 495 U.S. at 619. The trend today is toward establishing a standard of "clear and convincing" rather than "preponderance of the evidence". Oklahoma's statute specifically providing that the burden of proof is by clear and convincing evidence became effective June 25, 1980. Pennsylvania selected the "clear and convincing standard" in 1976[2] while Connecticut adopted the clear and convincing standard in 1980[3] and Rhode Island followed in 1993[4].

Other states have adopted a variety of procedures to determine whether a criminal defendant is incompetent. Alabama requires that the defendant bear the burden of production that he is incompetent before the burden shifts to the State to prove the defendant competent by clear and

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[2]50 Pa. Cons. Stat. §7403(a) (1983)

[3]Conn. Gen. Stat. § 54-56d (b) (1981)

[4]R.I. Gen. Laws § 40.1-5.3-3 (1993).

convincing evidence.[5] Missouri[6], Idaho[7], and Indiana[8] require that the court be "satisfied" as to incompetence, suggesting a higher quantum of proof than mere likelihood. Kentucky[9], Maine[10], Michigan[11], Montana[12], North Carolina[13], Oregon[14] and Nebraska[15] require the issue of incompetence to be "determined" by the court but do not provide for a specific standard of proof. The District of Columbia[16], Kansas[17] and Arizona[18] require their

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[5]Lackey v. State, 615 So.2d 145 (Ala. Ct. App. 1982)

[6]State v. Clark, 546 S.W.2d 455 (Mo. 1977)

[7]State v. Potter, 712 P.2d 668 (Idaho 1985); State v. Powers, 537 P.2d 1369 (Idaho 1975).

[8]Wallace v. State, 486 N.E.2d 445 (Ind. 1985).

[9] Ky. Rev. Stat. Ann. § 504.100 (Supp. 1994)

[10]State v. Lewis, 584 A.2d 622 (Me. 1990)

[11]Mich. Comp. Laws § 330.2020 (Supp. 1995)

[12]Mont. Code Ann. § 46-14-221 (Supp. 1995)

[13]N.C. Gen. Stat. § 15A-1002 (1994)

[14]Or. Rev. Stat § 161.370 (1993)

[15]Neb. Rev. Stat. § 29-1823 (1989)

[16]D.C. Code Ann. § 24-301 (Supp. 1995)

[17]State v. Costa, 613 P.2d 1359 (Kan. 1980)

[18]State v. Lara, 880 P.2d 1124 (Ariz. Ct. App. 1994)

decisions regarding incompetency to be based on the "sound discretion of the trial judge", providing for no specific standard of proof. The State of Maryland requires that competence must be found beyond a reasonable doubt.[19]

B.

OKLAHOMA'S CLEAR AND CONVINCING STANDARD ALLOCATES THE RISK OF ERROR TO REFLECT SOCIETAL VALUES.

Whether states have adopted their clear and convincing standards in light of Addington v. Texas, 441 U.S. 418 (1979) is not particularly relevant. What is clear is that this Court's holding in Addington supports such a standard. In Addington, a case involving civil proceedings for involuntary commitment, this Court held the function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication". Addington, 441 U.S. at 423, quoting In re Winship, 397 U.S. 358, 370 (1970). This standard serves to allocate the risk of error between the litigants and to indicate the value society places on individual liberty.

This Court has used the "clear and convincing" standard where the interest at stake are deemed to be more substantial then mere loss of money. For example, this standard is required in civil commitment proceedings, Addington, 441 U.S. at 324; procedures for an unmarried, unemancipated minor who seeks to obtain an abortion without parental

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[19]Hill v. State, 369 A.2d 98 (Md. Ct. Spec. App. 1977)

notice or consent, Ohio v. Akron Reprod., 497 U.S. at 515; parental rights termination proceedings, Santosky v. Kramer, 455 U.S. 745 (1982); proceedings to withdraw life-sustaining treatment, Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990); deportation proceedings, Woodby v. INS, 385 U.S. 276 (1966); denaturalization proceedings, Schneiderman v. United States, 320 U.S. 118 (1943); and to confine an insane criminal defendant beyond his criminal sentence, Foucha v. Louisiana, 504 U.S. 71 (1992).

In upholding a "clear and convincing standard" in Cruzan, 497 U.S. at 280, this Court recognized the interests of the state to seek to protect life and noted that the standard of proof served as "a societal judgment about how the risk of error should be distributed between the litigants". The individual interests at stake in the state proceeding were both "particularly important" and "more substantial than mere loss of money".

In Medina, 112 S.Ct. at 2576, this Court adopted the analytical approach set forth in Patterson v. New York, 432 U.S. 197 (1977) and applied a more narrow inquiry than the balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976). This Court held in Patterson that the burden of proof should be equal to the risk. In the context of competency proceedings, the burden of having the defendant carry a clear and convincing burden serves the purpose of placing the burden on the party who has access to the most information. In Gomez v. Toledo, 446 U.S. 635, 641 (1980) this Court allocated the burden of pleading good faith qualified immunity in a civil rights action against a public official to the defendant based in part on the conclusion that "whether such immunity has been established depends on facts peculiarly within the knowledge and control of the

defendant".

A state's decision on where to place the burden does not violate due process unless "it offends some principle of justice so rooted in the traditions and conscience of our peoples to be ranked as fundamental". Patterson, 432 U.S. at 201-202, quoting Speiser v. Randall, 357 U.S. 513, 523 (1958); Leland v. Oregon, 343 U.S. 790, 798 (1952); Snyder v. Massachusetts, 291 U.S. 97, 05 (1934).

The risk of a decision which does not comport with societal values is not greater but rather, is less likely with the use of a clear and convincing standard. There are many variables which come into play when assessing a person's competency. The one common factor, however, is that where the defendant is the party claiming to be incompetent he has exclusive control over his outward manifestations.

If a defendant is truly incompetent, a clear and convincing standard should not be difficult to meet, particularly where such incompetence is based upon organic brain disease, capable of medical proof, or severe retardation, usually evidenced historically. Rather, this standard serves to ward off abuses in the system. The concept of malingering is a common one amongst those who claim to be incompetent. The defendant controls the arena as he has exclusive control of all external behaviorisms. Generally, a defendant also controls the information supplied to mental health professionals which ultimately results in expert findings. The State cannot compel answers to a personality inventory, descriptions of inkblots, completion of phrases, drawing of figures, or even speech itself from an unwilling defendant.[20]

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[20]This Court has also held that a state may not force a defendant to take psychotropic drugs. Riggins v. Nevada, 504 U.S. 127 (1992).

This Court has found the availability of attorneys and expert assistance a significant factor for establishing a clear and convincing standards on minors to prove maturity or best interests in abortion cases. Ohio v. Akron Reprod. Health Center, 497 U.S. 502 (1990). This standard better accommodates the possibility that a defendant may be malingering. With a preponderance standard,[21] malingering is more difficult to differentiate. When a defendant simply has to prove that he is more likely than not incompetent, that defendant who is arguably incompetent may easily demonstrate signs shifting the degree of "proof" to 51 percent and thereby escape prosecution, temporarily or permanently. If, however, a higher standard is in place, the chances of manipulating the facts to result in an erroneous finding of incompetency are far less.

A clear and convincing standard also accommodates a defendant's interests should he later become incompetent. Oklahoma's statutory scheme provides an additional protection for criminal defendants as it provides that a determination may be initiated at any time during the criminal proceedings if the court has a doubt as to competency. Okla.Stat.tit. 22, § 1175.2(A) . This Court noted in Drope v. Missouri, 420 U.S. 162, 181, that even where a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial. Thus, an

[21]Whenever the term "preponderance of the evidence" is used, it is generally preceded by the adjective "mere", an indication of the extremely low burden that concept entails. Schad v. Arizona, 501 U.S. 624, 642 (1991); Ohio v. Akron Reprod., 497 U.S. 502, 516 (1990); Rivera v. Minnich, 483 U.S. 574, 578 (1987); Addington, 441 U.S. at 423.

erroneous finding of competency, should one occur, would not be the final step but is merely a threshold finding.[22] The procedure of repeated evaluations was employed in this case as questions were raised regarding Petitioner's competency prior to and during trial. Even after Petitioner had been found to be competent to stand trial, Petitioner, on the day of trial, raised the issue again and was evaluated by another psychologist.

The uncertainly of psycho-science is also a factor which weighs in favor of a higher burden. As this Court recognized in Addington, 441 U.S. at 426-27:

> At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely not one for confinement. However, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the

[22]One would assume that in the case of a truly incompetent defendant, defense counsel would notice the signs early in the criminal proceedings and raise the issue immediately.

chances that inappropriate commitment will be ordered.

An erroneous finding of incompetency may prevent a trial from taking place at all or may postpone it for an indefinite period of time. The fact that a criminal trial may be forestalled or even delayed due to an erroneous finding of incompetency is not a factor to be taken lightly. This Court has recognized, in the context of speedy trial issues, that delay may work to a defendant's advantage. In Barker v. Wingo, 407 U.S. 514, 521 (1972), this Court noted that delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. See also Costello v. United States, 365 U.S. 265, 283 (1961) ("Government's proof made more difficult when a numbers of witnesses admitted their memories of details had dimmed with the passage of the years); Ponzi v. Fessendon, 258 U.S. 254 (1922) ("Delay in the trial of accused's persons greatly aids the guilty to escape because witnesses disappear, their memories become less accurate and time lessens the vigor of officials charged with the duty or prosecution").

This Court has also recognized the harm to the government through delays in bringing federal habeas corpus actions. When a habeas petitioner obtains a new trial, the government is put at a disadvantage through the 'erosion of memories' and the 'dispersion of witnesses" that occur over time. These delays diminish the chance of a reliable criminal adjudication on retrial. O'Neal v. McAninch, __ U.S. __, 115 S.Ct. 992 (1994); McCleskey v. Zant, 499 U.S. 467, 491 (1991). Public faith in the judicial system is

also eroded when trials are delayed by determinations of incompetency which are not supported by evidence which is clear and convincing.

The Government's interest in prosecuting criminals is enhanced by a clear and convincing standard of proof. Competency to stand trial is not an element of the offense with which a defendant is charged. Once a defendant is found competent to stand trial, all of the other protections that surround that trial remain, and the prosecution still must prove beyond a reasonable doubt every element of the crime with which the defendant has been charged. Furthermore, a determination that a defendant is competent to stand trial may be modified later if changed circumstances indicate the defendant is no longer or never was competent to stand trial. Okla.Stat. tit. 22, § 1175.2(A). This possibility arose during the criminal proceedings in this case and Petitioner was examined by another psychologist immediately prior to trial and a second hearing was conducted.

Moreover, under Oklahoma law, a defendant's competency may be raised not only by the defendant but also by the prosecution or the trial court. In instances where the issue of competency is raised by someone other than the defendant, the defendant has a right not to be committed even temporarily without due process. Jones, 463 U.S. at 361. The clear and convincing standard protects this right.

Addington requires clear and convincing evidence to support an involuntary commitment. If a defendant's psychological manifestations are such that he can meet a mere preponderance burden to enjoin a criminal trial but are below the level necessary for commitment, he will be in a legal limbo. Absent a finding of dangerousness, by clear and convincing evidence, the State is powerless to protect its citizens through either its mental health or judicial processes.

The State of Oklahoma should not be required to employ a standard of proof that may completely undercut efforts to further the legitimate interests of the State and the person whose competency is in question. "Due process does not require that every conceivable step be taken, at whatever costs, to eliminate the possibility of convicting an innocent person. Punishment of those found guilty by a jury, for example, is not forbidden merely because there is a remote possibility in some instances that an innocent person might go to jail". Patterson, 432 U.S. at 208. It is even more true in the context of competency proceedings, which do not involve criminal convictions, that due process does not require a standard so low that any defendant with potential signs of incompetence may meet it.

C.

THE CLEAR AND CONVINCING STANDARD IS NOT SO HIGH AS TO VIOLATE DUE PROCESS.

Presumptions carry great weight in the law, so great that even in the context of criminal trial proceedings, this Court has approved of state statutes which place burdens on criminal defendants to overcome presumptions. In Parke v. Raley, ___ U.S. ___ , 113 S.Ct. 517 (1992), a criminal defendant unsuccessfully contended that Kentucky's rule requiring that criminal defendant's may challenge prior convictions that form the basis of a current charge was unfair because it may be difficult to prove the invalidity of a conviction entered many years ago. The Parke Court quoted from Medina, 505 U.S. at 452, "The Due Process Clause does not, however, require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused". This Court realized

that when a defendant challenges the validity of a previous guilty plea, the government will "not invariably, or perhaps even usually" have superior access to evidence. "Indeed, when the plea was entered in another jurisdiction, the defendant may be the only witness who was actually present at the earlier proceeding. . . To the extent that the government fails to carry its burden due to the staleness or unavailability of evidence, of course, its legitimate interest in differentially punishing repeat offenders is compromised. In light of the relative position of the defendant and the prosection in recidivism proceedings, we cannot say that it is fundamentally unfair to place at least a burden of production on the defendant". Parke, 113 S.Ct at 524-525.

This logic supports Respondent's position that, because the bulk of the information regarding competency is in the hands of the defendant, it is not unfair to make him carry a middle level burden to demonstrate incompetence.

By asking this Court to find this burden violates Due Process, Petitioner is seeking to apply the Due Process Clause mechanistically. This Court cautioned against such in Irvine v. California, 347 US. 128 (1954) when it stated:

> Since due process is not a mechanical yardstick, it does not afford mechanical answers. In applying the Due Process Clause judicial judgment is involved in an empiric process in the sense that results are not predetermined or mechanically ascertainable.
>
> The effort to imprison due process within tidy categories misconceives its nature and is a futile endeavor to save the judicial function from the pains of judicial judgment.

Those states which place the burden of proof on the prosecution have different statutory schemes than what is in place in Oklahoma. This Court made clear in Medina v. California, 112 S.Ct. at 2580, that placing the burden on the state is not constitutionally required. The fact that certain states provide a criminal defendant more protection than is constitutionally required does not compel this Court to **require** such.

Petitioner argues that the jury instruction defining "clear and convincing" exacts a higher burden than the plain language. The faulty instruction, however, was never used and there is no evidence in the record that it was even considered. Its mere existence had no bearing on the case whatsoever.

The instruction now in place reads, "[w]hen I say that a party has the burden of proving any proposition by clear and convincing evidence, I mean that you must be persuaded, considering all the evidence in the case, that the proposition on which the party has this burden of proof is highly probable and free from serious doubt. OUJI-Civil 3.2 (1993).

There is a distinction between "clear and convincing" and "clear, unequivocal and convincing". Addington, 441 U.S. at 431. This Court recognized the distinction made by the Ohio Supreme Court in Ohio v. Akron Reprod., 497 U.S. at 515:

> Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance,

> but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. **It does not mean clear and unequivocal".**[23]

The district judge, in applying the statutory language, stated in his finding that the defendant had not met his burden by clear and convincing evidence (App. 43). The court did not make a finding that the defendant had not met his burden by "clear, unequivocal and convincing" evidence.

There is nothing "fundamentally unfair" about placing the burden of proof on a criminal defendant to prove incompetence. This Court made this point clear in Medina. Likewise, there is nothing "fundamentally unfair" about providing for a "clear and convincing" standard of proof. It is the criminal defendant who is attempting to enjoin the criminal proceedings from taking place and it is he who should be held to a standard higher then a mere preponderance. Under Oklahoma law, the right to an injunction must be established by clear and convincing evidence. The Oklahoma courts also use the terms "with certainty", "clear", "clear and satisfactory" and that the right must be supported by the "clearest" proof. Thomas v. Hampton, 583 P.2d 506, 507 (Okla. 1978).

This case is an excellent example of why the Oklahoma Legislature set the standard higher than a "mere preponderance". Petitioner's attorneys first informed the trial court they were concerned about Petitioner's competency because he was "unable to comprehend his attorney or to meaningfully assist in the defense of his case" (Record 336). Petitioner's own expert had not seen him for

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[23]Alabama's statute uses the term "clear, unequivocal and convincing", a distinction from Oklahoma's statute.

four months at the time of the hearing. (C.H.I 10) The State's expert concluded Petitioner was competent (C.H.I 43-44). In the second hearing, evidence indicated Petitioner acted normally in other criminal proceedings and in situations which did not involve the murders. Even Petitioner's own psychologist was of the opinion Petitioner had an affective disorder and was malingering and Petitioner's own counsel perceived Petitioner as a malingerer (App. 17, C.H. II 26). The question in determining competency is not whether the defendant will assist in his defense, but whether he is capable of doing so. A clear and convincing evidence standard serves the purpose of winnowing out the evidence and distinguishing those defendants who will not assist from those who cannot.[24]

[24]No claim was made that Petitioner could not consult with his attorney on the appeal and no request has been made to the Oklahoma Department of Corrections to place Petitioner in a mental health facility since his incarceration on death row.

II.

ALTHOUGH CAPITAL CASES ARE DIFFERENT IN CERTAIN RESPECTS, THIS COURT HAS NOT PROVIDED THAT CAPITAL CASES ARE ENTITLED TO THEIR OWN SET OF PROCEDURAL RULES, INDEPENDENT OF PUNISHMENT ISSUES.

Lastly, Petitioner makes the "death is different" argument. While death is different to the extent that those cases in which capital punishment is rendered may require a heightened level of reliability, this does not mandate separate procedures for determining competency in capital cases. In Herrera v. Collins, 506 U.S. ___, 113 S.Ct. 853 (1993), this Court held that the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed.[25]

In Johnson v. Mississippi, 486 U.S. 578, 584 (1988), this Court noted the fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "need for reliability in the determination that death is the appropriate punishment" in any capital case. This Court has also held that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination. California v. Ramos, 463 U.S. 992, 998 (1983).

However, this Court has not held that capital cases

[25]This Court has also refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus. Murray v. Giarratano, 492 U.S. 1, 9 (1989).

require a separate rule of law. This Court has recognized that the states are bound by basic rules of law even as it relates to sentencing in capital cases. In Romano v. Oklahoma, 512 U.S. ___, 114 S.Ct. 2004 (1994), this Court held the Eight Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings. In Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), this Court articulated the standard for evaluating ambiguous jury instructions. In so doing, this Court stated:

> There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation.

This statement is indicative of this Court's policy that while the qualitative difference of death from all other punishments requires a greater degree of scrutiny, it does not require separate procedural rules on allocations and degrees of proof burdens.

In the more egregious cases, particularly capital cases, the incentive to malinger or falsify symptoms increases proportionality, making the intermediate burden of proof even more appropriate.

Moreover, although this is a capital case, Oklahoma's competency statutes apply across the board from the least serious misdemeanor to the most serious felony. In many instances, the punishment for the crime committed is only a matter of days or weeks. A finding of incompetency, however, can result in a much lengthier period of deprivation of liberty. In those instances, a burden higher

than a "mere preponderance" works to the defendant's advantage.

III.

STATES ARE FREE TO ADOPT THEIR OWN STANDARDS OF PROOF CONSISTENT WITH THEIR OWN CONCEPTS OF PUBLIC POLICY AND FAIRNESS.

Under the concept of federalism, the states are free to tailor their own standards of proof as applicable to the particular interests at stake, bearing in mind that other protections afforded in the statute are a factor in determining the risks involved. In Addington, 441 U.S. at 431, this Court stated, "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold". In Addington, this Court, while finding the "clear and convincing" standard constitutionally required, held that the determination of the precise burden equal to or greater than the "clear and convincing" standard was a matter of state law which was left to the Texas Supreme Court. Id. at 433. As statutes vary from state to state, procedures to protect due process must also be allowed to vary.

Competency is not an element of the offense which the state must prove in order to convict but is a threshold issue necessary to be resolved in order to prevent a violation of due process through conviction of a person incompetent to stand trial. While this Court has been diligent in protecting a defendant's due process rights, it has not, and should not ignore the power of the individual states to adopt their own procedures for determining incompetency.

For many years, this Court has shied away from

becoming a rulemaker for state courts. In Estelle v. McGuire, 502 U.S. 62 (1991), this Court stated:

> Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial . . . But it has never been thought that such cases establish this Court as a rule making organ for the promulgation of state rules of criminal procedure.

States are free to regulate the procedure of their courts in accordance with the state's own concepts of policy and fairness unless in so doing it offends some "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". Snyder v. Massachusetts, 291 U.S 97, 105 (1934).

Procedures do not run afoul of the Fourteenth Amendment because another method may seem to be fairer or wiser or to give a surer promise of protection. Leland v. Oregon, 343 U.S. 790, 799 (1952). In Leland, the law at issue was an Oregon rule that required the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt. This Court noted that Oregon is the only state that requires such a standard of proof, although some twenty states place the burden on the accused to establish insanity by a preponderance of the evidence or some similar measure of persuasion. This Court noted that while there is a distinction between the two rules as to the quantum of proof required, there is no practical difference of such magnitude as to be significant in determining the constitutionality of the statute. In refusing to interfere with Oregon's determination of its policy with respect to the burden of proof in the issue of sanity, this Court stated:

> The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncracies of a merely personal judgment . . . An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review.

Leland, 343 U.S. at 799.

As this Court noted in Patterson, 432 U.S. at 201:

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government [citation omitted] and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion.

Even in those rare instances in which this Court has spoken with regard to a particular standard of proof, this Court has held that "determination of the precise burden . . . is a matter of state law properly left to state legislatures and state courts". Santosky v. Kramer, 455 U.S. at 769-770. Although due process has required that basic procedural safeguards be observed, balancing of society's interests against those of the accused has been left to the legislative branch. Medina, 112 S.Ct. at 2577. The

Oklahoma Legislature, consistent with due process, chose to adopt a clear and convincing standard of proof in determining competency. This Court recently reaffirmed that competency to stand trial is a factual issue. Thomas v. Keohane, No. 94-6615, 1995 U.S. LEXIS 8315 (November 29, 1995); Maggio v. Fulford, 462 U.S. 111, 117 (1983). In the context of habeas corpus proceedings, a finding of competency by a state court is entitled to a presumption of correctness in federal court. Such a finding is consistent with this Court's position of deference to state court findings on issues of incompetence.

It is not unreasonable for Oklahoma to conclude that society has more than a minimal concern with the outcome of competency proceedings. The State of Oklahoma has a great interest in assuring its citizens a fair and speedy trial, together with the presumption of competency which is historically based. Respondent asks this Court to protect the power of Oklahoma to do so by affirming the conviction below.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

BYRON KEITH COOPER,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals Of Oklahoma

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ARGUMENT

NEITHER HISTORY, NOR PRECEDENT, NOR SOUND CONSTITUTIONAL POLICY JUSTIFIES OKLAHOMA'S CHOICE TO PLACE A BURDEN UPON DEFENDANTS TO DEMONSTRATE THEIR INCOMPETENCY TO STAND TRIAL BY CLEAR AND CONVINCING EVIDENCE.

A. Introduction.

Respondent does not contest the most important point in this case: the peculiarly high burden that Oklahoma places on defendants to demonstrate their incompetence to stand trial is unprecedented at common law and entirely foreign (until recently) to traditional American criminal practice. Neither federal law nor the law of forty-six of the fifty states places so high a burden on defendants. This burden violates the fundamental right not to be tried while incompetent and corollary constitutional rights implicit in this fundamental right.[1]

---

[1] These corollary constitutional rights include: effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984); waiving the privilege against compulsory self-incrimination by taking the witness stand, *Boykin v. Alabama*, 395 U.S. 238 (1969); the right to confront one's accusers, *Pointer v. Texas*, 380 U.S. 400 (1965); the right to testify on one's own behalf, *Rock v. Arkansas*, 483 U.S. 44 (1987); acceptance of the guidance of counsel, *Godinez v. Moran*, ___ U.S. ___, 113 S.Ct. 2680 (1993) (citing *Faretta v. California*, 422 U.S. 806 (1975)); the right to remain silent without penalty for doing so, *Griffin v. California*, 380 U.S. 609 (1965); and other rights and factors encompassed in these corollary constitutional rights which are relevant to the truth-seeking function. *See* Brief of *Amicus* National Association of Criminal Defense Lawyers 9-17; *Riggins v. Nevada*, 504 U.S. 127, 139-45 (1992) (Kennedy, J., concurring in judgment).

B. Reliance On This Court's Precedents Is Misplaced And Sound Policy Fails To Justify Support For Respondent's Position.

Respondent relies on *Addington v. Texas*, 441 U.S. 418 (1979), but that reliance is, to say the least, misplaced. *Addington* held that, in order to adequately protect an individual's constitutional right to liberty, due process required that the *government* bear the high burden of clear and convincing evidence. 441 U.S. at 431-33. *Addington* in no way offers support for the proposition that the *individual* should bear that high burden before his constitutional right will be honored; if anything, *Addington*'s solicitude for the constitutional rights of the individual argues positively *against* Respondent's position.

Accepting Respondent's position would mean that we are no longer asking that an individual share equally with the state the risk of error for an erroneous competence finding, but saying the state's interest is significantly more important than the defendant's fundamental right not to be tried while incompetent. This standard does exactly what *Addington* forbids: it strips away an individual's liberty interest – in this case Petitioner's fundamental constitutional right not to be tried while incompetent – without minimal constitutional protections. The Respondent asks this Court to condone a practice that allows it to try factually incompetent individuals, contrary to the purpose of the Due Process Clause to protect individual interests, and contrary to this Court's concern that we "jealously guard" the fundamental right not to be tried while incompetent. *Drope v. Missouri*, 420 U.S. 162, 172, 173 (1975).

This Court has used the clear and convincing standard not as Respondent simplistically implies (i.e., when the interests at stake are deemed to be more substantial than the mere loss of money [Brief of Respondent 25]), but more precisely, when the risk of harm to individual liberty is sufficiently important to require additional protection against an erroneous decision. For example, a state could not satisfy the *Addington* standard by passing a civil commitment law that required an individual to prove he was not committable by clear and convincing evidence. The harm created by the clear and convincing standard is that a factually incompetent defendant will be adjudged in a trial he does not understand and in which he cannot even minimally participate. The Constitution does not tolerate this severe impairment of the truthseeking function of the criminal trial.

Raising the standard does not *reduce* the risk of error, it merely *reassigns* it by requiring more incompetent defendants to stand trial. That is, the rate of error is not reduced; it is only the consequences of the errors that change. Indeed, as a logical matter, it may increase the number of mistaken competency findings by requiring the trier of fact to reject its own beliefs about the truth of the matter when those beliefs do not rise to the clear and convincing standard.

Respondent's reliance on *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), is similarly misplaced. There, this Court upheld the placement of a clear and convincing evidence burden upon a minor seeking a judicial bypass of a parental consent requirement. The Court did so, however, because of a critical fact omitted

from Respondent's analysis: the judicial bypass procedure was an *ex parte* one in which no litigant was present to advance state interests that might militate against the minor's claim.[2] Thus, *Akron* is readily distinguishable.

The state is a most active litigant in the competency procedure. Adjudication of a defendant's incompetence does not occur until the state has had every opportunity to develop the facts and make its position known. The state, if it chooses, in preparation for a competency hearing, may observe a defendant at a state hospital or jail mental ward 24 hours a day, seven days a week. It can subject the defendant to interviews with and evaluations by mental health professionals. The state can run countless medical tests including testing blood levels after medication treatment. It can administer any and all available psychological tests. The state has complete access to observation and continued observation of the defendant. No defense attorney or defense mental health expert will have any greater opportunity to develop evidence of incompetence.

Respondent argues a defendant may refuse psychological tests and refuse to cooperate with state mental health professionals. Brief of Respondent 27. *Medina v.*

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[2] Additionally, the liberty interest of a *minor* to have an abortion is subject to important limitations, "[a]s immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences." *Hodgson v. Minnesota*, 497 U.S. 417, 458 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part) (citing *Bellotti v. Baird*, 443 U.S. 622, 640-41 (1979)).

California, 505 U.S. 437 (1992), permits the state to adequately protect this interest, for if the defendant fails to prove he is incompetent, he will be found competent. Obviously, if the factfinder determines a defendant is not cooperating with the state doctors willfully, this will be taken into consideration in determining whether the burden already placed on the defendant has been met. It is quite clear that placement of the burden of proof on the defendant by a preponderance of the evidence, as *Medina* allows, adequately protects the state interest. It is a giant leap from equipoise and the placement of the burden of proof on the defendant to condone a practice that makes it easier for the state to try incompetent individuals by sacrificing the accuracy of the competency determination.

Respondent also argues that a preponderance standard is unnecessary because modern procedures – the appointment of an attorney and a psychiatric expert – sufficiently protect the defendant's right not to be tried while incompetent. *See* Brief of Respondent 22.

Petitioner was found competent despite having two qualified criminal defense lawyers who, once convinced of Petitioner's incompetency, which this Court has recognized might change at any time, *Drope*, 420 U.S. at 180-81; *Pate v. Robinson*, 383 U.S. 375, 385-86 (1966), zealously argued Petitioner was incompetent. They presented uncontroverted psychological expert testimony that Petitioner was suffering from mental illness and was incompetent. Dr. Murphy observed that Petitioner's thought patterns became confused during his examination on May 4, thus impeding effective communication. App. 12,

21.[3] Petitioner's inappropriate responses to questions during his own testimony on May 4, and the incident in which he ignored counsel – while testifying – to talk to the deputy, likewise demonstrate that he was easily distracted. C.H.II 54-55. Moreover, Petitioner was exhibiting this same symptom back in August, 1990, when Dr. King examined him and determined him to be incompetent to proceed to trial. C.H.I 6,13,20.[4]

Trial counsel presented evidence confirmed by psychological experts that Cooper believed his attorney, the prosecutor, and two other persons were conspiring to kill him and had in fact entered his jail cell and tried to strangle him. C.H.II 42-43, 46, 57-61, 71. This bizarre

[3] Distractibility is a common symptom of many mood disorders. *See Diagnostic and Statistical Manual of Mental Disorders* 322, 329, 335 (4th ed. 1994).

[4] Dr. King is a licensed clinical psychologist for the Department of Mental Health and was not employed by the defense, as counsel for Respondent implies. *See* Brief for Respondent 3, 5; Record 344-45. Dr. King gave the following descriptions of Petitioner's distractibility when she observed him in 1990:

> He was not coherent. He was disoriented. He couldn't maintain concentration. He had some bizarre material. He couldn't focus on the questions. So, at that time, he was not able to communicate sufficiently well.

C.H.I 6.

> He wasn't testable. There would be no point in trying to test somebody whose attention was wandering all over the room and being wild in his answers. . . .

C.H.I 13.

> [H]e was incoherent. His answers were fragmented. He could not pursue a thought to it's [sic] conclusion. . . .

C.H.I 20.

delusion contributed to an irrational fear of his attorney which was observed by the court at the competency hearing on May 4, 1992, as Petitioner repeatedly backed away from counsel, and during the trial as Petitioner sat in a corner away from his attorneys. C.H.II 43-44, 46-48, 50, 54, 61-62, 69-71, 84, 261-63; App. 37-38.

Zealous advocacy, undisputed psychiatric diagnosis and evaluation, and numerous manifestations of Petitioner's incompetency which the trial court itself observed before and during the trial, however, were insufficient to establish Petitioner's incompetence under Oklahoma's standard. C.H.II 272. This case thus demonstrates the extreme difficulty of establishing incompetence under a clear and convincing standard, even with counsel and uncontroverted expert testimony, and the factfinder's difficulty in applying that standard even in the face of strong evidence.[5]

[5] *Amici* argue that because counsel is now constitutionally guaranteed, a defendant's personal competency is now a somewhat less critical feature of a fair trial than it was at common law. Brief of *Amici* for Respondent 20. As Justice Kennedy has recently noted:

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so. *Drope v. Missouri*, 420 U.S. 162, 171-172, 95 S.Ct. 896, 903-904, 43 L.Ed.2d 103 (1975).

Riggins v. Nevada, 504 U.S. 127, 139-40 (1992) (Kennedy, J., concurring in the judgment).

Additionally, although the common law rule against trying individuals who were incompetent "arose during an era when

Respondent and *Amici* for Respondent also argue that inquiries as discussed in *Drope* and *Pate* and in the Oklahoma statutes are sufficient to protect the fundamental right not to be tried while incompetent. Brief of Respondent 14-18; Brief of *Amici* 17, 18. These inquiries are meaningless if the standard for determining competency after this inquiry is so high that factually incompetent individuals will be tried. After Petitioner asserted incompetency on May 4, the inquiry was limited to the hearing itself where Cooper had to prove his incompetence by clear and convincing evidence. No searching inquiry was made after trial counsel re-raised the competency question as *Amici* suggest, *id.* at 17, and no clinical evaluation was undertaken despite the fact that Petitioner had been committed to Eastern State Hospital twenty months earlier upon a finding by the court Petitioner was incompetent. The ability to re-raise competency under the facts of Cooper's case consisted solely of a hearing to determine if Cooper could by "clear and convincing" evidence now show his incompetency.

Where incompetency must be found by clear and convincing evidence, the appointment of counsel, the right to hire experts, and state inquiry procedures are grossly inadequate to protect the fundamental right not to be tried while incompetent. *See Pate*, 383 U.S. at 378. The clear and convincing standard fails to safeguard the

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there was no right to counsel in most criminal cases," Brief of *Amici* for Respondent 20, this Court's insistence that the Due Process Clause prohibited the practice came at a time when counsel was already constitutionally mandated. Compare *Drope v. Missouri*, 420 U.S. 162 (1975) and *Gideon v. Wainwright*, 372 U.S. 335 (1963).

defendant's fundamental right not to be tried while incompetent, a bedrock right necessary to the protection of all constitutional rights implicit in the criminal trial itself.

C. A Uniform Standard Of Proof Has No Effect On The Committability Of Incompetent Individuals.

Respondent implies that a criminal defendant who cannot meet the *Addington* clear and convincing test for civil commitment, but who establishes by a preponderance of the evidence he is incompetent and thereby suspends the criminal trial, may somehow be placed in a legal "limbo." Brief of Respondent 31; Brief of *Amici* 13.

The issues Respondent seeks to compare are not parallel, much less identical. They are two different substantive standards that examine two different issues. The purpose of a criminal competency evaluation is to determine whether an individual lacks the capacity to understand the nature of the proceedings and the ability to assist his counsel in preparing a defense. *Dusky v. United States*, 362 U.S. 402 (1960); Okla. Stat. tit. 22, §§ 1175.1-1175.8 (1991 & Supp. 1995). Civil commitment, on the other hand, requires existence of a mental disability which meets the code's definition and potential dangerousness to either himself or others. *O'Connor v. Donaldson*, 442 U.S. 563, 575 (1975); Okla. Stat. tit. 43A, §§ 1-103(14), 5-401 (Supp. 1995). Thus, the fact that a preponderance standard exists on the issue of incompetence has absolutely no bearing on the civil determination. Even when a defendant meets the *Dusky* standard by

clear and convincing evidence, beyond a reasonable doubt, or beyond all doubt, it remains theoretically possible that the state would be unable to civilly commit him.

Respondent has not shown and cannot show that this is a real-world problem. The state has made no showing that people charged with serious crimes are in this legal limbo. Respondent has provided no evidence of experience from the forty-six states or the Federal Government, which have standards lower than clear and convincing proof for incompetence, indicating practical problems which would justify Respondent's hypothetical concerns.

In sum, comparing criminal incompetence to civil commitment is like comparing apples to oranges. Having identical standards of proof for commitment and competence has no effect on the committability of incompetent defendants. Moreover, having different standards will not stand in the way of the commitment of any individual who needs commitment while the state seeks to restore or establish competence.[6] Clearly, identical standards of proof will not cure the state's purported legal limbo.[7]

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[6] Pursuant to *Jackson v. Indiana*, 406 U.S. 715 (1972), a defendant who has been found incompetent to stand trial may – as a consequence of that determination – be committed for a reasonable period of time in order to attain competency. That period of commitment surely does not require a predicate finding of incompetency by clear and convincing evidence; if it did, then the practice followed by the overwhelming majority of American jurisdictions would be unconstitutional.

[7] Again, it is important to realize that almost all incompetency commitments are temporary. Brief for Petitioner 29 n.28. Additionally, Dr. King noted during her testimony, "You hardly ever find somebody that can't respond to some treatment, some medication. It does happen, but it's relatively rare." C.H.I 28.

The non-real world problem conjectured by the state must be stacked up against the very real, increased harm in trying and convicting factually incompetent defendants. The state's asserted interest fails to constitute any reason, much less a sufficiently compelling reason, to justify the increased number of cases that will violate our constitutional prohibition against the trial of an incompetent.

D. Clear And Convincing Proof Of Incompetency Does Not Facilitate Detection of Malingering.

Respondent contends without authority of any kind that malingering is more difficult to differentiate under a preponderance standard than under a clear and convincing standard. Brief of Respondent 28. Respondent submits no empirical data to demonstrate that malingering is more difficult to differentiate with a preponderance standard. Moreover, there is no indication or support from any source that a requirement of clear and convincing evidence is effectively targeted to the alleged problem.[8] The only certain result is that fewer individuals will be found incompetent as the standard of proof increases.

Respondent's own expert testified that malingering is not that difficult to detect. Dr. Russell, who testified for the state at Cooper's competency hearing on January 18, 1991, noted that it would be very difficult for someone to

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[8] The overwhelming majority of American jurisdictions, including a majority of the states signing the *Amicus* Brief of the state of Utah, have found themselves able to afford more protection for the constitutional rights of a defendant – even as they face and share the same concerns as does Respondent.

attempt to answer questions in a manner that might give the appearance of incompetence and keep that up 24 hours a day, seven days a week on a ward. C.H.I 93.[9] Even though the state argued to the trial judge and invited the trial judge to conclude Cooper was malingering, the trial judge never determined at any time that Petitioner was malingering, only concluding that Cooper had not met the clear and convincing burden of proof.[10]

Judges and prosecutors are not unfamiliar with the concept of malingering. Examining psychiatrists and psychologists are well versed in the features of malingering

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[9] She also indicated that a lay person not versed in clinical literature would not be aware of symptoms necessary to present himself as being mentally ill unless he had "read a lot of books" and even then it is hard to keep up that presentation of incompetency 24 hours a day when being observed, concluding, "It's very difficult." C.H.I 93.

Dr. Edith King similarly noted malingering is usually fairly easy to spot. C.H.I 14.

[10] Dr. Murphy believed Petitioner was partially malingering, but nonetheless concluded he was truly incompetent. While at the state hospital, numerous factors showed Cooper was not feigning incompetency. Cooper told the staff on two occasions what he was charged with. C.H.I 58,59. On October 10, a note in Cooper's file indicated he was willing to discuss his charges and demonstrated an understanding of courtroom procedures, and his desire to return to court. He gave rational answers to questions about the criminal justice system and courtroom procedure. C.H.I 83-87. He told Dr. Russell he wanted to go back to court and go on with the defense of Not Guilty by Reason of Insanity (a defense that was not presented during Cooper's trial). C.H.I 97-98.

Dr. King was also adamant that when she observed Cooper he was not malingering. "In my opinion he was not malingering. He did not look like a malingerer to me." C.H.I 19.

and are taught not only to look for it in competency evaluations, but even to suspect malingering. Brief of Petitioner 29-32.

Concern for malingering certainly does not justify increasing the standard of proof to a standard as high as clear and convincing evidence when neither logic nor empirical data supports an increased ability to differentiate malingering. This is especially true in light of the magnified risk of erroneous determinations of competency which violate the fundamental right not to be tried while incompetent.

CONCLUSION

Respondent's placement of the clear and convincing burden on defendant can find no support in history, tradition, precedent or policy. In short, it finds no support in any of the sources to which this Court turns in ascertaining the meaning of due process. It is no wonder, then, that Respondent is left to claim that "the due process provided to determine competence is left to the states." Brief of Respondent 13. Under Respondent's no-holds-barred view of due process, it presumably would be constitutional for a state to require defendants to demonstrate their incompetency to stand trial by proof beyond a reasonable doubt, or for that matter by proof beyond any and all doubt. The due process clause is not, however, a *carte blanche* to the states. While it is for each state to prescribe, in the first instance, its rules of practice, it is ultimately for this Court to determine whether those

practices accord with fundamental principles of due process – or, conversely, whether they fail to "jealously guard" the fundamental rights of the individual, *Pate* 383 U.S. at 385-86, and thus offend principles of justice that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 112 S.Ct. 2572, 2577 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

Under the appropriate test, as stated in *Medina*, the practice that Oklahoma has adopted offends due process. As no one disputes, Oklahoma's practice will bring to trial as competent defendants who would be deemed incompetent in the overwhelming majority of American jurisdictions. It is difficult in the extreme to see how such a practice can be deemed "adequate" to protect an individual's fundamental constitutional right not to stand trial while incompetent. It is a gross departure from the accepted range of historical practice, and it finds no support in precedent or sound reason.

Respectfully submitted,

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BYRON KEITH COOPER,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Oklahoma Court of Criminal Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE AMERICAN NETWORK OF COMMUNITY OPTIONS AND RESOURCES, AND THE AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS IN DEVELOPMENTAL DISABILITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATE OF OKLAHOMA,
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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.3(b) of the Rules of this Court, the American Association on Mental Retardation, *et al.*, respectfully move the Court for leave to file a Brief *Amici Curiae* in the above-entitled case. Counsel for Petitioner has granted his consent to the filing of this brief. Counsel for Respondent has informally notified counsel for *amici* that they will not consent.

Amici include national professional and voluntary associations concerned with criminal proceedings affecting people with mental disabilities. *Amici* thus have expertise concerning criminal defendants with mental disabilities and the nature of their possible incompetence. Although the Petitioner in this case is an individual with mental illness, rather than mental retardation, *amici* are aware that the Oklahoma rule also applies to defendants with

mental retardation. *Amici* wish to present to the Court relevant information from the clinical literature on defendants with mental retardation. *Amici* also wish to address the particular difficulties present when the evidentiary burden is placed on a defendant by clear and convincing evidence.

Amici believe that the Oklahoma statute, providing that a defendant can be found incompetent to stand trial only if the defendant proves incompetency by clear and convincing evidence, will produce trials of substantial numbers of incompetent defendants, and will thereby risk erroneous convictions.

CONCLUSION

For the above-stated reasons, we respectfully urge the Court to grant this motion for leave to file the accompanying brief in the present case in support of Petitioner.

Respectfully submitted,

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BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE AMERICAN NETWORK OF COMMUNITY OPTIONS AND RESOURCES, AND THE AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS IN DEVELOPMENTAL DISABILITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amici curiae are national professional and voluntary organizations concerned with the interests of citizens who have mental disabilities. *Amici* thus have expertise concerning criminal defendants with mental disabilities and the nature of their possible incompetence.

THE AMERICAN ASSOCIATION ON MENTAL RETARDATION (AAMR) is the nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. AAMR has appeared before this Court on numerous occasions as *amicus curiae*, most recently in *Romer v. Evans*, No. 94-1039.

THE ARC (formerly the Association for Retarded Citizens of the United States) is an association of parents, family members, professionals, and persons with mental retardation devoted to promoting the interests of people with mental retardation and their families.

THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION is an interdisciplinary professional organization of mental health professionals, including psychiatrists, psychologists, social workers, educators, and allied professionals concerned with the problems, causes, and treatment of mental disabilities.

THE AMERICAN NETWORK OF COMMUNITY OPTIONS AND RESOURCES (ANCOR) represents more than 660 agencies nationwide that together support more than 50,000 people with mental retardation and other disabilities. Most of the members operate community residences and support people in their own homes. About 85 percent of ANCOR members are nonprofit agencies. The remainder are proprietary agencies or unincorporated family care homes.

THE AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS IN DEVELOPMENTAL DISABILITIES (AAUAP) is a national organization of university-based research, training, and model demonstration programs in the field of mental retardation.

SUMMARY OF ARGUMENT

The prospect of a criminal trial proceeding when the defendant's mental disability renders him incapable of understanding what is happening and unable to assist his counsel is anathema to our system of justice. Such trials certainly were unacceptable at common law. In modern terms, a trial while defendant is unfit to proceed increases the risk of the conviction of an innocent person while, at the same time, impeaching the dignity and reputation of our courts.

Raising the burden of persuasion on the defendant to prove his own incompetence by "clear and convincing evidence" increases the likelihood that incompetent defendants will actually face trial in Oklahoma. To determine whether such an increased risk is tolerable under the Due Process Clause, this Court must first determine whether the risk is increased appreciably by the heavier burden. If, as *amici* believe, the risk is expanded substantially, the Court must then determine whether there is a sufficiently compelling reason that justifies this increased number of cases that will violate the constitutional prohibition against trying unfit defendants.

Amici's analysis focuses on defendants with mental retardation, who clearly fall within the scope of the Oklahoma law. Forensic clinicians generally agree that individuals with mental retardation already pose a substantial problem of undetected incompetence even without the increased burden of persuasion. The "invisible" nature of their handicap is exacerbated by their strong motivation to prevent others from finding out how disabled they are. The result is that truly unfit defendants, a crucial minority of whom may be innocent, will face trials they do not comprehend. Raising the standard of proof can only increase the number of such defendants standing trial. Additionally, *amici's* survey of evidentiary formulations in state law demonstrates that in many states, including Okla-

homa, the interpretation of "clear and convincing evidence" creates an extraordinarily heavy burden of proof on disabled defendants.

The state has two possible motivations for this novel and exceptional law, only one of which is legitimate. The legitimate goal would be to detect malingering defendants. But for defendants with mental retardation, malingering is simply not a practical problem. And even for defendants with mental illness, there is no empirical evidence to suggest (nor any logical reason to suppose) that raising the burden will somehow selectively identify or target those who may attempt to feign incompetence.

The only other motivation for raising the burden to this extraordinary level is to allow for the trial of a greater number of defendants, regardless of whether they are fit to stand trial. This is not a legitimate state purpose.

Since the risk of incompetent defendants standing trial is increased substantially by the Oklahoma law, and since the law does not address directly a substantial problem that outweighs that risk, this Court should hold that it violates the Due Process Clause of the Fourteenth Amendment.

ARGUMENT

I. ANY TRIAL OF AN INCOMPETENT DEFENDANT RAISES THE MOST SERIOUS ISSUES OF FAIRNESS.

Following a venerable common law tradition, this Court has repeatedly emphasized that no trial of an incompetent defendant will be tolerated. *Pate v. Robinson*, 383 U.S. 375 (1966); *Godinez v. Moran*, 113 S.Ct. 2680, 2685 (1993). Writing for a unanimous Court, Chief Justice Burger described this principle as "fundamental to an adversary system of justice." *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

The importance that this Court has placed on the prohibition against trying individuals with such severe disabili-

ties that they are not competent derives both from history and contemporary perceptions of fairness. "Few principles are as firmly embedded in Anglo-American criminal jurisprudence as the doctrine that an 'incompetent' defendant may not be put to trial." Michael L. Perlin, *Law and Mental Disability* 502 (1994); *Medina v. California*, 505 U.S. 437, 446 (1992) ("The rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage."). But *amici* are less concerned with tracing the precise lineage of competence jurisprudence through Hale and Blackstone, than with fair treatment of individuals with disabilities and the practical functioning of competence evaluations in the contemporary criminal justice system.[1]

The Due Process requirement[2] that defendants must be competent to stand trial is not merely an artifact of ancient

[1] *Amici* recognize that in determining the requirements of due process in criminal cases there have been differences within the Court on the precise role of historical antecedents and of balancing contemporary equities. *See Medina v. California*, 505 U.S. 437, 453-54 (1992) (O'Connor, J., concurring in the judgment). While recognizing the importance of traditions in making these judgments, *amici*, as organizations concerned with mental disabilities, believe the Court should be aware of the practical consequences of adopting constitutional rules in this area.

[2] Although *amici* remain deeply troubled by the continuing problem of individuals with mental retardation on death row in those states that still permit such executions, *see Amici Curiae* Brief of American Association on Mental Retardation *et al.*, *Penry v. Lynaugh*, 492 U.S. 302, 336 (1989), we do not believe that the Court should decide this case under the Eighth Amendment, as applied to the states by the Fourteenth Amendment. Although this Court's Eighth Amendment cases requiring full and fair adjudication in death penalty cases are certainly broad enough to encompass a ruling prohibiting a state from substantially increasing the risk of a capital trial of an incompetent defendant, *amici* believe that the Due Process Clause offers a preferable source for such a holding. This Court has never suggested that states may be less vigilant in preventing the trial and punishment of incompetent defendants in noncapital cases.

legal concerns. It is central to our courts' assurance to the nation's citizens that all cases involving accusations of crimes are being fairly adjudicated. "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." *Riggins v. Nevada*, 504 U.S. 127, 139-40 (1992) (Kennedy, J., concurring in the judgment).[3]

But in addition to unfairness to defendants, the prohibition on trying incompetent individuals has an additional justification. It has long been recognized that trying a defendant who lacks a basic understanding of the charges and proceedings is an unacceptable affront to the court system itself. Trial of a defendant whose disability renders him unable to comprehend that trial with "a rational as well as factual understanding," *Dusky v. United States*, 362 U.S. 402 (1960), has been analogized to the trial of a defendant *in absentia*. The courts cannot command the respect of our citizens if they allow such sham proceedings. "To proceed against such a person offends the moral *dignity* of the process." Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. Crim. L. & Criminology 419, 426 (1990) (hereinafter Bonnie).

Therefore in the case at bar, there are two basic issues. The first is how greatly the Oklahoma rule placing the burden on the defendant by "clear and convincing evidence" increases the likelihood of a trial of a defendant who does not meet the *Dusky* criteria. And the second

[3] While there is a sense in which the goal of the competence requirement can be characterized as "modest," *Godinez v. Moran*, 113 S.Ct. 2680, 2688 (1993), its function is no less crucial because of its relatively limited expectations of defendants.

issue is whether that increase in the number of trials of incompetent individuals is justified by a sufficiently compelling benefit to the criminal justice system.

Amici are particularly concerned about the unique problems presented by defendants with mental retardation.[4] We believe that placing this extraordinarily heavy burden on defendants who have mental retardation will result in a substantial number of factually incompetent defendants facing trial. We further believe that any hypothesized or anticipated benefit to the criminal justice system from this rule is illusory.

II. DEFENDANTS WITH MENTAL RETARDATION FACE A SUBSTANTIAL RISK OF BEING TRIED WHILE INCOMPETENT, AND PLACING AN EXTRAORDINARY BURDEN OF PROOF ON THEM WILL INCREASE THAT RISK UNACCEPTABLY.

As this Court has recognized, people with mental retardation "have a reduced ability to cope with and function in the everyday world." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985). There are few settings in which this is as dramatically true as it is in the criminal justice system. *See generally The Criminal Justice System and Mental Retardation: Defendants and Victims* (Ronald W. Conley, Ruth Luckasson & George N. Bouthilet eds., 1992) (hereinafter Conley).

Although detailed and reliable empirical data on the rate of referral for evaluations are not plentiful,[5] it is

[4] The case at bar involves an individual whose competence was questioned because of mental illness rather than mental retardation. This Court has never suggested that different rules should be applied, or that different constitutional factors are to be considered, in mental illness cases on the one hand and mental retardation cases on the other. The Oklahoma statute clearly governs both groups of individuals, and *amici* believe that the Court should consider the risk of trying any and all incompetent defendants under that statute.

[5] *See generally* Thomas Grisso, *Five-Year Research Update (1986-1990): Evaluations for Competence to Stand Trial*, 10

widely accepted among scholars, clinicians, and lawyers involved in the criminal justice system that many defendants with mental retardation[6] fail to receive an adequate assessment of their competence to stand trial. *See, e.g.*, Bonnie, *supra*, at 420-21; Ira Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, 17 Cal. W. L. Rev. 365 (1981); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 415, 458 (1985) (hereinafter Ellis & Luckasson); Laboratory of Community Psychiatry, Harvard Medical School, *Competency to Stand Trial and Mental Illness* 6 (1973) (hereinafter Laboratory of Community Psychiatry) ("it is our impression that the competency issue is raised too often for the mentally ill and too infrequently for the mentally retarded"). This is particularly troubling since mental retardation can produce such limitations in the person's abil-

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Behav. Sci. & the Law 353 (1992); Kirk Heilbrun & Steven Collins, *Evaluations of Trial Competency and Mental State at Time of Offense: Report Characteristics*, 26 Professional Psychology: Research and Practice 61 (1995); Henry J. Steadman & Eliot Hartstone, *Defendants Incompetent to Stand Trial*, in *Mentally Disordered Offenders: Perspectives from Law and Social Science* 39 (John Monahan & Henry J. Steadman eds., 1983).

[6] The accepted definition of mental retardation is that of the American Association on Mental Retardation (AAMR): *"Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992). This disability, although often confused with mental illness, has substantially different characteristics. *See generally* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 415, 423-25 (1985).

ity to comprehend the proceedings that the accuracy and fairness of the trial process are compromised.[7] Several attributes common to criminal defendants who have mental retardation make this problem particularly serious.

Unlike many defendants with mental illness, the potential incompetence of individuals with mental retardation is seldom a product of irrational or distorted thought processes (such as delusional beliefs).[8] Rather, mental retardation may render a person incompetent because his intellectual limitations make him incapable of understanding such relatively abstract concepts as the adversarial process. Laboratory of Community Psychiatry, *supra*, at 14 (particular reason for concern about the competence of individuals with mental retardation because of their cognitive deficits "and their characterstic dependency and

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[7] *Amici* do not mean to suggest, of course, that all defendants with mental retardation are incompetent to stand trial. While many such individuals are competent, and substantially more can be rendered competent by targeted education and habilitation, *see* Ellis & Luckasson, *supra*, at 459-60, the problem remains serious. While reliable data are not yet available, anecdotal experience of clinicians in the field strongly suggests that trials of incompetent defendants who have mental retardation occur with disturbing frequency.

[8] Of course, some defendants who have mental retardation may also be mentally ill. *See* John H. Noble, Jr. & Ronald W. Conley, *Toward an Epidemiology of Relevant Attributes*, in Conley, *supra*, at 17, 26; Ruth Luckasson, *The Dually Diagnosed Client in the Criminal Justice System*, in *Mental Retardation and Mental Health: Classification, Diagnosis, Treatment, Services* 354 (Jack A. Stark, Frank J. Menolascino, Michael H. Albarelli & Vincent C. Gray eds., 1988). While the presence of both disabilities may mean that such defendants are more likely to be referred for evaluation on competence issues, the evaluator may fail to identify both disabilities, and if one handicap "masks" the other, the evaluation may not produce an accurate assessment of the individual's functioning. *Id. See also* Michael J. White, Cassandra N. Nichols, Robert S. Cook, Paul M. Spengler, Blain S. Walker & Karsten K. Look, *Diagnostic Overshadowing and Mental Retardation: A Meta-Analysis*, 100 Am. J. Mental Retardation 293 (1995) (gathering most recent research on dual diagnosis).

malleability which permits them to be easily manipulated"). Or the individual's retardation may mean that he lacks the most rudimentary knowledge necessary to meet the *Dusky* test, such as the roles of the major participants in the trial. Ellis & Luckasson, *supra*, at 431.

It might be expected that such gross deficiencies in the knowledge and understanding necessary to be competent under the not-extraordinarily-demanding *Dusky* test would be readily detectable. The underidentification of incompetence among defendants with mental retardation becomes understandable only upon closer examination of the situation in which these individuals find themselves. *See* Ellis & Luckasson, *supra*, at 427-32. One factor is the lack of experience and training of criminal justice system personnel in identifying and dealing with individuals with mental retardation. Caroline Everington & Ruth Luckasson, *Addressing the Needs of the Criminal Defendant with Mental Retardation: The Special Educator as a Resource to the Criminal Justice System*, 24 Education & Training in Mental Retardation 193, 194 (1989). Typically, the possibility of a defendant's incompetence comes to light only when he exhibits behaviors that call attention to his mental illness. Caroline Everington, *Demographic variables associated with competence to stand trial referral and evaluation of criminal defendants with mental retardation*, 17 J. Psychiatry & Law 627, 637 (1989); Ellis & Luckasson, *supra*, at 458 n.242. Even clinicians employed by the criminal justice system to evaluate potentially incompetent defendants focus almost exclusively on the possibility that the defendant's perceptions and understanding may be impaired by mental illness. A.E. Daniel, Niels C. Beck, Adolph Herath, Mark Schmitz & Karl Menninger, *Factors correlated with psychiatric recommendations of incompetency and insanity*, 12 J. Psychiatry & Law 527, 538 (1984); Caroline T. Everington, *The Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR): A Validation Study*, 17 Crim. Just. & Behav. 147, 148-49 (1990).

But the key to the phenomenon of underidentification is that typically an individual who has mental retardation tries to make certain that no one discovers the actual severity of his disability.[9] Although it may initially appear paradoxical or even implausible, it is abundantly clear that defendants with mental retardation continue to make extraordinary efforts to mask the existence and extent of their disability and its effects, even when the revelation and understanding of the handicap would work to their advantage. *See* Ellis & Luckasson, *supra*, at 430-31, 457-58. *See also* John J. McGee & Frank Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System* in Conley, *supra*, at 55, 63 ("many persons with mental retardation are never identified, because they are perceived as quiet, cooperative, and 'normal' in appearance"); Robert Perske, *Unequal Justice? What Can Happen When Persons with Retardation or Other Developmental Disabilities Encounter the Criminal Justice System* (1991) (journalistic accounts).

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[9] This phenomenon has long been recognized by clinicians and social scientists who study mental retardation. *See, e.g.*, Robert B. Edgerton, *The Cloak of Competence: Stigma in the Lives of the Mentally Retarded* 148 (1967); Andrea G. Zetlin & Jim L. Turner, *Self-Perspectives on Being Handicapped: Stigma and Adjustment*, in *Lives in Process: Mildly Retarded Adults in a Large City* 93 (Robert B. Edgerton ed., 1984).

III. PERMITTING STATES TO REQUIRE DEFENDANTS WITH MENTAL DISABILITIES TO DEMONSTRATE THEIR INCOMPETENCE BY "CLEAR AND CONVINCING EVIDENCE" CREATES A SUBSTANTIAL RISK OF MISCARRIAGES OF JUSTICE.

A. Requiring proof at a level higher than the standard "preponderance of the evidence" reflects a judgment about the acceptability of different types of errors.

This Court has made clear that a principal function of establishing a standard of proof is "to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979). "The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision." *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 283 (1990). In the instant case, the issue becomes who will bear the risk of error where the evidence about a defendant's competence is not perfectly certain. The Oklahoma statute declares that a defendant must stand trial even if he produces credible proof that he is incompetent by a "preponderance of the evidence" standard unless that proof also satisfies the more burdensome standard of "clear and convincing evidence." Okla. Stat. Ann. tit. 22, § 1175.4 (West Cum. Supp. 1996).[10]

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[10] Only a few states currently place the burden of demonstrating incompetence on defendants by "clear and convincing evidence" as Oklahoma does. *See, e.g.*, Conn. Gen. Stat. Ann. § 54-56d(b) (West 1994); Pa. Cons. Stat. Ann. tit. 50, § 7403(a) (1995 Cum. Supp.); R.I. Gen. Laws § 40.1-5.3-3(b) (1994 Cum. Supp.). But if this Court were to approve the constitutionality of the Oklahoma approach, it is likely that legislators in other states would seek to adopt such a "constitutionally-certified" measure for limiting the rights of criminal defendants. Each such state would, of course, be incorporating by reference its own prior understanding of the term "clear and convincing evidence."

B. "Clear and convincing evidence" is a very heavy burden, which will be understood by triers of fact to require a substantial level of certainty.

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington*, 441 U.S. at 423 (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). While acknowledging that jurors, in particular, may not master the precise nuances of differences between various standards of proof, *Addington* made clear that the identification of a standard of proof "is more than an empty semantic exercise." *Id.* at 425 (internal citations omitted). It is the law's method of telling triers of fact how certain they must be before they can reach a certain conclusion.

By requiring proof that a defendant with a mental disability is incompetent by "clear and convincing" evidence, the Oklahoma statute instructs the judge or jury that it must allow the trial to proceed unless its certainty about the proof of incapacity rises to an extraordinary level. To evaluate the constitutionality of this burden, it is important to consider the meaning that courts have ascribed to "clear and convincing evidence."

Although the concept of a burden of persuasion somewhere between "preponderance of the evidence" and "proof beyond a reasonable doubt" may have its origins in the equity cases of chancery courts, *see* 2 *McCormick on Evidence* § 340 (J.W. Strong ed., 4th ed. 1992), much of the impetus for its modern development derives from decisions of this Court prescribing its use for constitutional reasons. *See, e.g., Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285 (1966) ("clear, unequivocal, and convincing evidence"). In recent decades, the use of this standard has proliferated in both case

law and statutes. *See, e.g., Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

The interpretations of this formulation by state courts reveal the magnitude of the burden it imposes. *See, e.g., Angela P. v. Ronald P.*, 623 P.2d 198, 204 (Cal. 1981) (requiring evidence "so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind") (internal quotations omitted); *Orkin Exterminating Co. v. Traina*, 486 N.E.2d 1019, 1022 (Ind. 1986) ("a standard which is but minutely below the 'reasonable doubt' standard"); *Estate of Larimore v. Chatterton*, 381 N.E.2d 76, 77 (Ill. App. Ct. 1978) ("a quantum of proof which leaves no reasonable doubt in the mind of the trier of fact"); *Fix v. Fix*, 847 S.W.2d 762, 765 (Mo. 1993) ("The evidence must be unquestionable in character. The evidence must be so clear, cogent, and convincing as to exclude every reasonable doubt in the mind of the trial court."); *Pickens v. Black*, 885 S.W.2d 872, 876 (Ark. 1994) ("the evidence must be so strong as to be substantially beyond reasonable doubt"). Similarly, commentators who have addressed the meaning of this standard have described this as an extraordinary burden. *See, e.g.*, David F. Forte, *The Role of the Clear and Convincing Standard of Proof in Right to Die Cases*, 8 Issues in Law and Medicine 183, 185 (1992) ("For most courts, it is the highest standard of proof that can be applied in civil cases.").

Oklahoma's Supreme Court has found that a similarly heavy burden rests on any litigant who must prove a matter by "clear and convincing evidence." "Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established." *Matter of C.G.*, 637 P.2d 66, 71 n.12 (Okla. 1981) (citing as authority cases from the states of Washington, Alaska, Kansas, Oregon, and Colorado.

Since some jurisdictions, like Oklahoma, require or permit competence determinations to be made by juries, judicial explanations of the standard are particularly important when they take the form of jury instructions. The Oklahoma jury instruction, applicable at the time of Petitioner's case, emphasized the defendant's extraordinary burden. Oklahoma Uniform Jury Instructions — Civil 3.2, cited at p.6 of the Petition for Writ of Certiorari ("you must be persuaded, considering all the evidence in the case, that the proposition on which the party has this burden of proof is true, and that this conclusion is unmistakable and free from serious or substantial doubt as to its correctness").

A decade and a half ago, this Court identified "clear and convincing" merely as "intermediate" between "preponderance" and the criminal standard, and speculated that its precise meaning might prove elusive to triers of fact. But it is now clear that many states instruct factfinders that the intermediate standard is an extraordinarily heavy burden on litigants.[11]

C. Permitting the trial of a defendant unless the factfinder concludes that the proof of incompetence rises to the level of "clear and convincing evidence" will result in the trial of substantial numbers of defendants who lack any real understanding of the proceedings or who cannot assist in their defense.

Requiring a jury (or a judge) to find that the evidence of a defendant's trial incompetence is "unmistakable," or that it is "sufficiently strong to command the unhesitating assent of every reasonable mind," or that it produces "a

[11] Of course, it is possible that these explanations of "clear and convincing evidence" by the state courts are more demanding than the burden envisioned by this Court in cases like *Addington* which mandated that governments prove certain matters according to that standard. But the issue in this case is whether the states may constitutionally impose on defendants the burden of demonstrating their own incompetence by "clear and convincing evidence" as it has been formulated in state law.

firm belief or conviction," requires that the defendant face trial if substantial and persuasive evidence falls short of this elevated standard. Enforcement of this rule makes the trial of genuinely incompetent defendants inevitable.

Approval of the Oklahoma statute would vastly increase the risk of incompetent individuals being tried, convicted, and punished. In *Medina v. California,* 505 U.S. 437 (1992), this Court said that states could place the burden of persuasion on the issue of competence on defendants by a preponderance of the evidence. In doing so, the Court observed that it was not substantially increasing the risk of incompetent defendants facing trial because the rule affected only "a narrow class of cases where the evidence is in equipoise; that is where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent." *Id.* at 449. Thus, while it is theoretically possible that an incompetent defendant would face trial because the evidence on competence was in absolutely perfect balance, in reality all that *Medina* did was to permit states to require the defendant to come forward with evidence of incompetence, rather than sitting back, uncooperatively, in the hope that the state would be unable to make a showing of his fitness to stand trial. As Justice O'Connor observed, "States may therefore decide that a more complete picture of a defendant's competence will be obtained if the defense has the incentive to produce all the evidence in its possession." *Id.* at 455 (O'Connor, J., concurring in the judgment).

By contrast, raising the burden on defendant from "preponderance" to "clear and convincing" will add nothing to that incentive, since the defense would need no further inducement to produce all the evidence of incompetence in its possession. The state's reason for raising the burden on defendant must be sought elsewhere.

Since a heightened burden is unnecessary to address cases in which no evidence is presented, and since it is also unnecessary to encourage the defense to present evidence

it has of defendant's incompetence, its only justification must be that the state wants the opportunity to try, convict, and punish some of the defendants who can persuade the trier of fact, by a preponderance of the evidence, that they are unfit for trial. There may be a public demand for the punishment of the individual thought to be responsible for a particular crime, coupled with the perception that incompetence to stand trial is a legal technicality whose only function is to frustrate the criminal justice system. *See generally* Henry J. Steadman, *Beating a Rap? Defendants Found Incompetent to Stand Trial* (1979). Reduced to its essentials, the state's interest in raising the defendant's burden above preponderance is nothing more than the desire to try and to win more cases.[12] Such a justification cannot outweigh the risk of erroneous conviction that is inherent in any trial of an incompetent defendant.

Another concern that may be relevant to the issue of the standard of proof is the possibility that some defendants may "feign incompetence in order to avoid trial." *Medina,* 505 U.S. at 455 (O'Connor, J., concurring in the judgment). As a simple matter of logic, of course, any increase in the difficulty of establishing incompetence will reduce the number of persons found unfit, and some of those "screened out" by the heightened standard may be malingerers.[13] But there is no empirical support for the proposition that raising the standard of proof will selectively identify malingerers.

It is also important to note that whatever the prevalence of malingering may be in the area of mental illness, it is

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[12] Indeed, if Oklahoma succeeds in its claim that the Due Process Clause permits requiring the defendant to prove his incompetence by "clear and convincing evidence," it is unclear why a state could not require defendant to prove his incompetence beyond a reasonable doubt.

[13] The same would be true, of course, if the state raised the barrier to proof "beyond a reasonable doubt," or if it lifted the ban on trying incompetent persons altogether.

substantially less likely among defendants with mental retardation. First, it would be extraordinarily difficult to feign mental retardation convincingly. This is true both because of the nature and design of the psychometric instruments available to measure intelligence, and because individuals who have mental retardation have had it since childhood,[14] and generally have a "paper trail" of identification of their disability in school and social service records.[15] Additionally, malingering is not a real world problem in mental retardation cases because of the characteristic efforts by these defendants to attempt to mask the true severity of their disability.[16]

Any criminal trial of a factually incompetent individual impeaches the credibility and the very legitimacy of the criminal justice system. Trials of defendants who do not understand the proceedings, or who cannot assist counsel, carry the real prospect of valid alternative theories of the case that remain unexplored, exculpatory evidence that is not presented, potentially false confessions that go unchallenged,[17] and meritorious defenses that no one can raise. Such trials raise the likelihood of the conviction

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[14] By definition, mental retardation must be manifested before age 18. *See supra* note 6.

[15] It is even more unlikely that a defendant who actually does have mental retardation could successfully feign legal incompetence in the *Dusky* sense. Even if they were motivated to appear less knowledgeable and aware than they actually were, individuals whose measured intelligence is in the lowest 2½ percent of the population cannot plausibly be expected to be very good at calibrating their "pretended" deficits with any degree of sophistication or credibility.

[16] If anything, individuals with mental retardation are characteristically "anti-malingerers," seeking to appear smarter and more knowledgeable than they actually are.

[17] False confessions are a particular problem with defendants who have mental retardation. *See* American Bar Association, *Criminal Justice Mental Health Standards* 7-5.8, Cmt. at 308-310 (1989); Note, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 Va. L. Rev. 1471 (1995); Ellis & Luckasson, *supra*, at 445-52.

and punishment of innocent persons to an intolerably high level.

CONCLUSION

For the aforementioned reasons, *amici* urge reversal of the judgment of the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

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No. 95-5207

In The Supreme Court of the United States

October Term, 1995

BYRON KEITH COOPER,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

On Writ Of Certiorari To
The Oklahoma Court of Criminal Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers [hereinafter NACDL] respectfully moves for leave to file its attached brief as *amicus curiae*, in support of petitioner Byron Keith Cooper. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but has not been received.

Amicus curiae is an organization dedicated to promoting the fair administration of criminal justice and ensuring due process for persons accused of crime. The NACDL and its state and local affiliates speak for over 8,000 regular members and over 28,000 affiliate members. This case poses a question that is of great concern to *amicus curiae*: can a capital defendant be forced to prove his incompetency to stand trial by a heightened standard? The long-standing interests and expertise of *amicus curiae* will, we believe, aid this Court in its deliberations in this case. Some of

the underlying issues in this matter include whether applying a heightened standard of proof will result in the trial of mentally incompetent defendants and, if so, what sort of impact that will have on the trial process. As an organization of defense attorneys, *amicus curiae* brings to the Court information about the role of defense counsel and the ability of counsel to provide effective representation to mentally disabled defendants. For these reasons, *amicus curiae* respectfully asks the Court to grant this motion and to permit the filing of the accompanying brief.

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONER

QUESTION PRESENTED FOR REVIEW

May the state increase the risk of trying and sentencing to death a factually incompetent defendant by requiring a defendant to prove his or her own incompetency by clear and convincing evidence?

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers [hereinafter NACDL] is a non-profit corporation with a membership of over 8,000 attorneys and over 28,000 affiliate attorneys in fifty states. The American Bar Association recognizes the NACDL as an affiliate organization, and awards it full representation in its House of Delegates. The NACDL was founded over twenty-five years ago to promote, study and advance the knowledge of criminal law, and to encourage the integrity, independence and expertise of defense lawyers. Among the NACDL's objectives are to promote the proper and fair administration of criminal justice, and to ensure due process for persons accused of crime.

The NACDL is greatly concerned by the State of Oklahoma's position, which seeks to undermine the constitutional right not to be tried and sentenced while incompetent. In the experience of the members of the NACDL, it is not possible to provide reasonably effective representation to defendants who are mentally incapable of understanding the charges against them and of assisting in their defense. The State's position, if accepted by this Court, would greatly increase the likelihood that factually innocent people will be convicted because they cannot provide the information that would lead to their acquittal at trial. The State's position would also undermine the reliability of capital sentences because defendants who are unable to assist their attorneys are — by definition — unable to bring relevant mitigating circumstances to the attention of their counsel and the courts.

STATEMENT OF THE CASE RELEVANT TO BRIEF OF *AMICUS CURIAE*

A primary focus of this brief is the inability of criminal defense attorneys to represent incompetent defendants. This Statement of the Case is not intended to supplant the Statement in the Petitioner's Brief. This Statement is included because portions

of the trial record illustrate the difficulties that defense counsel experience in representing mentally disabled defendants.

Petitioner Bryan Keith Cooper was charged with capital murder. Mr. Cooper's lawyers were given the task of defending him against this most serious charge, but Mr. Cooper was afraid of his attorneys and could not communicate with them or with defense investigators about the case. During the April 29, 1992 pre-trial motion hearing, lead defense counsel, Mr. Mildfelt, explained that Mr. Cooper had lunged or swung at co-counsel, Mr. Ravitz, and had accused counsel of trying to kill him with a rope. J.A. __; Tr. 4/29/92 at 207, 210. At a later hearing, Mr. Cooper himself testified of his fear of his attorneys, explaining repeatedly that they had tried to choke and kill him. J.A. ___; Tr. 5/4-5/92 at 42, 43, 57, 71. A medical expert, Dr. Philip Murphy, testified that Mr. Cooper's fear of his attorneys was genuine and honest, and that it was not part of any malingering whatsoever. J.A. __; Tr. 5/4-5/92 at 195. Mr. Cooper's fear became manifest at various times in court. Mr. Cooper sat over in the corner of the courtroom prior to the trial. J.A. __; Tr. 5/4-5/92 at 8. During the trial, he sat a distance from counsel and appeared withdrawn, even to prospective jurors. J.A. __; Tr. 5/5/92 at 9; Tr. 5/6/92 at 145, 147. Mr. Cooper curled into a fetal position on several occasions. J.A. __; Tr. 5/11/92 at 75; Tr. 5/4-5/92 at 35.

Defense investigators thought that Mr. Cooper was incompetent. J.A. __; Tr. 4/29/92 at 212. Mr. Cooper's attorneys and investigators were unable to get any useful information from him. As investigator Randall Bush testified,

> "It's been my job to go up and talk to [Petitioner], try to find out as much about the case as possible so I can help him. I go up to talk to Byron on numerous occasions and I get nothing. His pants are on fire, our office is trying to kill him, nothing to help me with his case, nothing that I can use. Nothing."

Tr. 5/4-5/92 at 140. Mr. Bush further testified, "[e]very time I talk to Cooper he's been just like in outer space. I get nothing from him. I get absolutely nothing from Cooper to help me." Tr. 5/4-5/92 at 142. During the second week of trial, counsel explained that Mr. Cooper had not spoken to him since the trial began. J.A. __; Tr. 5/14/92 at 142.

The medical expert, Dr. Murphy, also testified that Mr. Cooper was unable to assist or communicate with his counsel. J.A. __; Tr. 5/4-5/92 at 194, 195. Dr. Murphy did believe, however, that Mr. Cooper could attain competency within a reasonable period of time if he was provided with appropriate treatment. J.A. __; Tr. 5/4-5/92 at 240. Though this evidence showed that Mr. Cooper could become competent if treated, the judge nevertheless proceeded to trial. Mr. Cooper was convicted and sentenced to death.

SUMMARY OF ARGUMENT

Requiring a capital defendant to prove incompetency to stand trial by a evidentiary standard as high as clear and convincing is a violation of the Fourteenth Amendment's Due Process Clause, as well as the Eighth Amendment's prohibition against cruel and unusual punishments, which is applied to the States through the Fourteenth Amendment.

The high evidentiary standard results in a fundamentally unfair trial, in violation of the Due Process Clause. In *Medina v. California*, 505 U.S. 437 (1992), the Court focused on historical tradition and contemporary norms to determine whether a procedure was fundamental to a fair trial. Nevertheless, *Medina* and other decisions indicate some disagreement among the members of the Court as to the extent that the interests of the parties should be included in the due process analysis. *Amicus curiae* submits that in assessing whether a State's procedure results in an unacceptable risk of a fundamentally unfair trial, the Court

should balance the interests of the parties and consider historical tradition and contemporary norms.

Applying this test, the Due Process Clause prohibits the State from requiring a defendant to prove incompetency by a standard higher than preponderance of the evidence. Any higher standard leads to a substantially greater likelihood of factually incompetent defendants being forced to trial. A lawyer representing an incompetent defendant will be unable to provide the effective assistance of counsel required by the Sixth Amendment because so many aspects of the defense are based upon the client's ability to cooperate and provide information. Given the inexactitude of psychiatric diagnoses, such a high standard means that many factually incompetent defendants will be unable to prove their own incompetency. The interests of the State in prosecuting swiftly are outweighed by the compelling interests of defendants not to be tried while incompetent, and by the fact that defendants found incompetent are committed to mental health facilities, and hence pose no danger to the community.

Further, there is a strong common law tradition supporting preponderance of the evidence as the appropriate standard of proof to determine whether an accused is competent to stand trial. At common law, an incompetent defendant could not be tried. The standard of proof of competency has traditionally been preponderance of the evidence because the procedures to determine competency in criminal cases were modeled on the civil competency processes. Also, contemporary norms, as evidenced by the practice of the overwhelming number of jurisdictions, favor a preponderance of the evidence standard.

Wholly apart from this due process concern, the Eighth and Fourteenth Amendments forbid the State from requiring a capital defendant to prove his or her mental incompetency by clear and convincing evidence. The State may not erect a procedural barrier to the sentencing jury's consideration of relevant mitigating

evidence. A defendant cannot appear before the jury and give meaningful testimony, or otherwise present evidence in mitigation, unless he or she is competent and is capable of working with defense counsel. Oklahoma's heightened standard of proof is constitutionally impermissible because it leads to the wholesale exclusion of the defendant from the sentencing process, and thus prevents the sentencing jury from considering relevant mitigating evidence.

ARGUMENT

I. The Due Process Clause Prohibits A State From Requiring An Accused To Prove His or Her Mental Incompetency By The Heightened Standard Of Clear and Convincing Evidence.

A. To determine whether a State's procedure is fundamentally unfair, the Court should balance the relative interests of the parties, and consider historical practice and contemporary norms.

A State's calibration of proof violates the Due Process Clause of the Fourteenth Amendment if it offends some fundamental and deeply-rooted principle of justice. *Medina v. California*, 505 U.S. 437, 446 (1992); *Patterson v. New York*, 432 U.S. 197, 201-02 (1977). In determining whether a fundamental and deeply-rooted principle of justice is offended, the Court often looks to historical tradition and contemporary norms. Members of the Court have not always agreed, however, on the extent to which the parties' interests ought to be weighed. *Amicus curiae* submits that the Court should expressly consider the relative harms to the State and to the accused in determining whether a high standard of proof denies a person a fundamentally fair trial. The due process calculus ought to include more than a search through history. It is not possible to determine what is a fundamental principle of justice unless one also considers the interests that that principle protects.

Prior to its decision in *Medina*, the Court appeared to balance the interests of the parties involved, often making reference to the *Mathews v. Eldridge*, 424 U.S. 319 (1976) balancing test.[1] For example, in *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), the Court ruled that the Due Process Clause requires the State to provide a psychiatrist to an indigent accused if the issue of sanity is likely to be a significant factor in the defense. In assessing the requirements of due process, the seven-justice majority in *Ake* determined that the accused's interest in the accuracy of the criminal trial is "almost uniquely compelling," *id.* at 78, and outweighs any financial burden to the State. *Id.* at 78-79. The Court considered that "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense," *id.* at 80, and that, without it, "the risk of an inaccurate resolution of sanity issues is extremely high." *Id.* at 82; *see also United States v. Raddatz*, 447 U.S. 667, 677 (1980) (citing to the *Mathews* balancing test in ruling upon a due process challenge to the use of magistrate judges to decide suppression motions); *cf. Dowling v. United States*, 493 U.S. 342, 353-54 (1990) (weighing the various interests at stake to decide whether admission of prior acts evidence made a trial fundamentally unfair).

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[1]In *Mathews*, the Court described a three-factor test for evaluating procedural due process claims. The factors to weigh are:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Mathews, 424 U.S. at 335.

In *Medina*, however, the Court moderated its mode of analysis. Ruling that the accused can be required to bear the burden of proving mental incompetency, a five-justice majority announced that "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which . . . are part of the criminal process." *Medina*, 505 U.S. at 443. The majority opinion in *Medina* focuses, to a large extent, on historical tradition. Nevertheless, in its opinion, the Court does appear to balance the interests at stake. *See id.* at 448 ("we turn to consider whether the rule transgresses any recognized principle of 'fundamental fairness' in operation" (citation omitted)); *id.* at 449 (discussing the relationship between a claim of incompetency and a defense of not guilty by reason of insanity). Indeed, in her concurrence in *Medina*, Justice O'Connor notes, "I read the Court's opinion to allow some weight to be given countervailing considerations of fairness in operation, considerations much like those we evaluated in *Mathews*." *Id.* at 454 (O'Connor, J., concurring). Justice O'Connor found the *Mathews* test "a useful guide". *Id.* at 453. Her opinion identifies a number of relevant considerations in determining whether the placement of the burden of proof on the defendant is fundamentally unfair, including whether the placement of the burden of proof on the State is necessary to enforce a further right protected by the Constitution, such as the right to be tried while competent. *Id.* at 455.

Though the majority in *Medina* places great weight on historical tradition, subsequent decisions rely more extensively on other considerations. The issue in *Parke v. Raley*, 506 U.S. 20, 113 S.Ct. 517 (1992) was whether the defendant could be required to bear the burden of challenging prior convictions under a recidivist statute. Writing for the Court, Justice O'Connor cites *Medina* and discusses historical tradition and contemporary practice. *Raley*, 113 S.Ct. at 524-25. But the Court's opinion also fully considers the interests at stake. It notes the State's interests in punishing habitual criminals. *Id.* at 522. It addresses the requirement that a guilty plea be knowing and voluntary, as

held in *Boykin v. Alabama*, 395 U.S. 238 (1969). *Raley*, 113 S.Ct. at 523. Finally, the opinion weighs the relative ability of each side to reconstruct records of prior convictions. *Id.* at 524-25.

Later the same Term, the Court decided *Godinez v. Moran*, __ U.S. __, 113 S. Ct. 2680 (1993). In ruling that the decisions to plead guilty and to waive counsel do not require a higher level of competency than that necessary to stand trial, the Court again considers the interests of the parties. The Court discusses the competency required to waive certain rights in the context of the nature of those underlying rights. *Godinez*, 113 S. Ct. at 2686-87. All criminal defendants must make important decisions once proceedings have been initiated. *Id.* at 2686. Decisions to plead guilty are not more complicated than other decisions that the accused must make. *Id.* And, "[t]his being so, we can conceive of no basis for demanding a higher level of competence for those defendants who choose to plead guilty." *Id.* In addition, "a trial court must satisfy itself that the waiver of [the defendant's] constitutional rights is knowing and voluntary," *Id.* at 2687. The Court's extensive discussion of the interests of the parties prompted a concurrence that restates the holding in *Medina*, and focuses on historical tradition. *Id.* at 2688, 2689-91 (Kennedy, J., concurring).

In deciding whether a heightened standard violated Mr. Cooper's right to due process, the court below placed undue reliance upon historical tradition. *See Cooper v. State*, 889 P.2d 293, 301-02 (Okla. Crim. App. 1995). This Court's analysis has not been so narrowly cabined. In determining the process due in criminal cases, the Court should consider the interests of both the State and the accused at least where, as here, the interests of the accused are those independently protected by the Constitution. After all, "[t]he concept of due process is, 'perhaps, the least frozen concept of our law — the least confined to history and the most absorptive of powerful social standards of a progressive society.'" *Medina*, 505 U.S. at 454 (O'Connor, J., concurring),

quoting Griffin v. Illinois, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring in judgment). Where a State's procedure substantially affects a defendant's ability to exercise rights that are independently protected by the Constitution, the impact of the procedure on those rights ought to be part of the due process calculus.

B. The balance of equities strongly favors a preponderance of the evidence standard.

1. An accused has compelling interests in being tried while competent and in receiving the effective assistance of counsel.

The petitioner here, and defendants in similar situations, have two separate but related constitutional interests that are threatened by a standard of proof as high as clear and convincing evidence.

The first interest is the constitutional right to be tried while competent. An accused's competency is essential to a fair criminal proceeding. In *Drope v. Missouri*, 420 U.S. 162 (1975), the Court acknowledged the long-accepted rule that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial" and held that this prohibition "is fundamental to an adversary system of justice." *Drope*, 420 U.S. at 171-72; *see also* American Bar Association Criminal Justice Mental Health Standards, Std. 7-4.1(b) (1989) [hereinafter ABA Mental Health Standards] (describing the standard to determine competency). As Justice Kennedy has explained, "[c]ompetence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel . . . ." *Riggins v. Nevada*, 504 U.S. 127,

139-40 (1992) (Kennedy, J., concurring in the judgment).

A second interest at stake, as identified by Justice Kennedy, is the Sixth Amendment right to effective assistance of counsel. A defendant who is tried while incompetent will likely also be denied his or her Sixth Amendment right because he or she will not be able to communicate sufficiently with an attorney to enable that attorney to provide effective representation. As the Court has stated, "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceedings." *Strickland v. Washington*, 466 U.S. 668, 691-92 (1984). Counsel's actions critically depend on "informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* at 691. The NACDL, as *amicus curiae*, is particularly concerned about the impact of Oklahoma's rule on the ability of counsel to deliver the effective assistance guaranteed by the Sixth Amendment.

A defendant needs to be able to appreciate the role of counsel and assist the attorney throughout the entire process. This requirement begins soon after the defendant is arrested, perhaps even during a custodial interrogation, and it is especially important when the lawyer begins to build a defense. "Many important rights of the accused can be protected and preserved only by prompt legal action." American Bar Association, Standards for Criminal Justice, Std. 4-3.6 (3d ed. 1993) [hereinafter ABA Standards] ("Prompt Action to Protect the Accused");[2] *see also* National Legal Aid and Defender Association, Standards for the Appointment and Performance of Counsel in Death Penalty Cases, Std. 11.4.1(d)(2) (1988) [hereinafter NLADA Standards] ("An in-

[2] "Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable" in assessing the performance of counsel. *Strickland*, 466 U.S. at 688.

depth interview of the client should be conducted within 24 hours of counsel's entry into the case"); American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.4.1(D)(2) (1989) [hereinafter ABA Guidelines] (same).

When counsel begins preparing the accused's defense, the defendant is usually the primary source of information. ABA Std. 4-3.2 cmt. at 152 ("Interviewing the Client"). The lawyer may need to take steps early in the case to gather and preserve evidence and to protect the client's rights. ABA Std. 4-3.6 cmt. at 171. If a client is incompetent, it may be impossible for counsel to get information from him or her. Social science studies confirm that incompetent defendants are more passive with their attorneys than are competent defendants, and they are much less helpful in developing the facts of the case.[3]

Counsel has a duty to consider filing all potentially available pre-trial motions, including motions to obtain discovery

[3] One study compared attorneys' perceptions of clients in two groups — those clients whose competence was presumed by counsel, and those clients whose competence was doubted by their attorneys, even if the clients were not the subject of competency hearings. Hoge, Bonnie, Poythress & Monahan, *Attorney-Client Decisionmaking in Criminal Cases: Client Competence and Participation as Perceived by their Attorneys*, 10 Behav. Sci. & the L. 385, 387 (1992). Of the "presumed competent" group, 82% were "unusually active" or "somewhat active" in participating in their case. *Id.* Of the "competence doubted" group, only 44% were "unusually active" or "somewhat active" in their case. *Id.* The majority of the "competence doubted" group (55.6%) were deemed "pretty passive" by their attorneys. *Id.* Similar disparities were found in the clients' abilities to assist in developing facts for the defense. *Id.* A follow-up study confirmed these general findings. *See* Poythress, Bonnie, Hoge, Monahan & Oberlander, *Client Abilities to Assist Counsel and Make Decisions in Criminal Cases*, 18 Law & Hum. Behav. 437, 442-43 (1994).

and to suppress evidence and statements. *See* NLADA Std. 11.5.1(b) (counsel has a duty to consider all potential pre-trial motions, including discovery and suppression motions); ABA Guideline 11.5.1(B) (same). Counsel's ability to seek exculpatory evidence during discovery will be greatly restricted if the client is too disabled to tell counsel about facts that might lead to that evidence.[4] Similarly, it is extremely difficult to bring motions to suppress evidence and statements without the assistance of the client.[5]

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[4] Whether defense counsel is successful in obtaining exculpatory evidence from the prosecution depends upon the attorney's ability to specify the evidence that is important to the defense. *See United States v. Agurs*, 427 U.S. 97, 106-07 (1976) (prosecution's duty to disclose certain exculpatory evidence may depend on whether there has been a specific request for it); Fed. R. Crim. P. 16(a)(1)(C) (upon demand, prosecution must turn over evidence that is material to the defense; unless a specific demand is made, however, the prosecutor may not know that evidence in his or her possession is material); *Allen v. District Court*, 803 P.2d 1164, 1168 (Okla. Crim. App. 1990) (prosecution shall disclose evidence that tends to negate the accused's guilt or reduce the punishment).

[5] A defendant must be competent to enable counsel to investigate and file a motion to suppress evidence or a statement that is unconstitutionally obtained. The accused will be a primary source of information on whether the police complied with the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). Further, the Court has identified numerous factors to be considered in evaluating whether a confession is involuntary. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986) ("coercive police activity"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1972) ("length of detention, prolonged nature of the questioning, and the use of physical punishment such as deprivation of food or sleep" (internal citations omitted)); *Culombe v. Connecticut*, 367 U.S. 568, 622-23 (1960) (Opinion of Frankfurter, J.) ("physical brutality, threats of physical brutality, . . . deprivation of sleep, . . . disregard of his rudimentary need for food, . . . gruelling, intensely unrelaxing questioning over protracted periods . . . " (footnotes omitted)); *Miranda*,

(continued...)

Many defenses, such as self-defense,[6] entrapment,[7] duress and necessity,[8] and good faith,[9] have subjective elements and are

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[5](...continued)
384 U.S. at 476 ("lengthy interrogation or incommunicado incarceration" and whether the accused was "threatened, tricked, or cajoled").

[6] For example, the Model Penal Code provides that, under certain circumstances, "the use of force upon or toward another person is justifiable when *the actor believes* that such force is immediately necessary . . . ." American Law Institute, Model Penal Code § 3.04 (1985) ("Use of Force in Self-Protection") (emphasis added); *see also* Model Penal Code § 3.02 ("Justification Generally: Choice of Evils") ("Conduct that *the actor believes* to be necessary to avoid a harm or evil to himself or to another is justifiable . . . ." (emphasis added)); *Martin v. Ohio*, 480 U.S. 228, 230 (1987) (trial judge had instructed the jury that, with respect to the burden of proof of self-defense, the defendant had to prove, *inter alia*, that the defendant had *an honest belief* that she was in imminent danger); E. Devitt and C. Blackmar, Federal Jury Practice and Instructions § 23.12 (4th ed. 1990) ("Lawful Self-Defense") (an element of a defense to crime of assault on a federal officer is whether the defendant "honestly believed" that he or she was being attacked).

[7] Jurisdictions are split, but many, including the federal system, retain a subjective component to the defense of entrapment. *See, e.g., Jacobson v. United States*, 503 U.S. 540, 548-50 (1992) (lack of predisposition is an element of entrapment defense); *United States v. Russell*, 411 U.S. 423, 433-36 (1973) (lack of predisposition is a factual element); Devitt & Blackmar, § 19.04 ("Entrapment — Explained") (no entrapment when the person has "a previous intent or disposition or willingness" to commit the crime).

[8] In *United States v. Bailey*, 444 U.S. 394 (1980), the Court stated that an element of the common law defenses of duress and necessity is that given the imminence of the threat, committing the offense "was [the defendant's] only *reasonable* alternative." *Bailey*, 444 U.S. at 411-12 (emphasis added). Pattern instructions provide that an element of the

(continued...)

virtually impossible to establish unless the accused is fully able to assist the lawyer, and testify at trial. Even affirmative defenses that can be proved through the testimony of other witnesses, such as an alibi defense, may require early actions on the part of the defense team.[10] An incompetent defendant may well be unable to provide counsel with the names of alibi witnesses in a timely fashion, much less be able to support the defense by testifying at trial.

Oftentimes in criminal cases, the issue is not whether the accused performed the act in question, but whether he or she had the requisite intent and capacity. ABA Std. 4-4.1 cmt. at 182 ("Duty to Investigate"); *see also* ABA Mental Health Std. 7-6.1 ("Defense of Mental Nonresponsibility"); NLADA Std.

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[8](...continued)
defense of duress, coercion or compulsion is that the defendant had a "well-grounded" or "well-founded" fear that a threat of death or serious bodily injury would be carried out. Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit § 6.04.02 (West 1995) ("Duress, Coercion or Compulsion"); *see also United States v. Kinslow*, 860 F.2d 963, 965-66 (9th Cir. 1988) (defendant must prove that "his fear was well grounded"), *cert. denied*, 493 U.S. 829 (1989).

[9] The defendant's good faith is a defense to many charges, such as fraud. "Good faith" is entirely subjective. As Devitt & Blackmar write, it means, "among other things, a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another." Devitt & Blackmar, § 19.06 ("The Good Faith Defense — Explained).

[10] *See, e.g.*, Fed. R. Crim. P. 12.1 (upon written demand by the prosecutor, defendant must state his or her specific whereabouts at the time of the crime and provide names and addresses of any alibi witnesses); Fed. R. Crim. P. 12.3 (defendant shall give pretrial notice if he or she intends to rely on a defense of public authority); Okla. Stat. Ann. tit. 22, § 585 (West 1992) (defendant must give notice of alibi defense prior to trial).

11.4.1(d)(2)(B) (counsel must explore information about the client's mental state and the presence or absence of any aggravating or mitigating factors); ABA Guideline 11.4.1(D)(2)(B) (same). The defendant may not be aware of the significance of facts relevant to criminal responsibility. A person who does not communicate these facts to his or her lawyer runs the risk of conviction even if that person acted under some diminished capacity.

Moreover, there are certain decisions that belong to the defendant, and an incompetent defendant will not be able to make them. *See* ABA Std. 4-5.2 ("Control and Direction of a Case"); ABA Std. 4-8.2 ("Appeal"). The decision to waive a jury trial must be made by the defendant alone. *See Patton v. United States*, 281 U.S. 276, 298 (1930) (trial by jury is a privilege that each defendant may forego at his or her election); ABA Std. 4-5.2 (a)(iii) (defendant's decision whether to waive a jury trial). Similarly, the decision to testify must be made by the defendant. *See Jones v. Barnes*, 463 U.S. 745, 750 (1983) (noting that defendant has the ultimate authority as whether to testify or not); ABA Std. 4-5.2(a)(iv). An accused must personally make the decision to enter a guilty plea. *See* ABA Std. 4-5.2 (a)(i) (defendant's decision to plead guilty or not guilty); NLADA Std. 11.6.1 ("The Plea Negotiation Process"); ABA Guideline 11.6.1. (same). A guilty plea must be knowing and voluntary, with a full understanding of the terms and conditions of the plea. *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969); NLADA Guideline 11.6.4(a) ("Entry of the Plea Before the Court"); ABA Guideline 11.6.4(A) (same). In addition, the decision whether to appeal is the defendant's own choice. ABA Std. 4-8.2 ("Appeal"). In order to determine whether to appeal, "[c]areful exploration should be made of the possible errors that could be pressed on appeal, their relative strengths and weaknesses, and the probable outcome of an appeal." ABA Std. 4-8.2 cmt. at 238.

Finally, the defendant's own participation is particularly critical at a capital sentencing. This participation has two aspects.

First, it is vital for the client to be capable of cooperating with counsel. In preparing for the sentencing phase, the attorney should consider calling witnesses "familiar with and evidence relating to the client's life and development, from birth to the time of sentencing." NLADA Std. 11.8.3(f)(1); ABA Guideline 11.8.3(F)(1) (same). Among the topics counsel should review are the client's medical, educational, employment, family and social histories, and rehabilitative potential. NLADA Std. 11.8.6(b) ("The Defense Case At The Sentencing Phase"); ABA Guideline 11.8.3(B) (same). An attorney who fails to conduct a full investigation and consult with her or his client is constitutionally ineffective. *See, e.g., Harris v. Dugger*, 874 F.2d 756, 763-64 (11th Cir.) (counsel was ineffective due to failure to conduct a full background investigation for sentencing phase), *cert. denied*, 493 U.S. 1011 (1989); *Middleton v. Dugger*, 849 F.2d 491, 493-95 (11th Cir. 1988) (same).

Counsel cannot provide the assistance required by the Sixth Amendment and professional standards unless the client is competent. As one commentator notes, the client must "actively assist in the investigation of his or her life entire life." Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 321 (1983). As part of this effort,

> "[c]ounsel will have to uncover witnesses from a possibly distant past, not only relatives, but childhood friends, teachers, ministers, neighbors . . . A substantial mitigating case may be impossible to construct without this kind of life-history investigation, which is a very different inquiry from an investigation of facts relating to an offense. Not only does it call for imagination and resourcefulness on the part of defense counsel, it also requires that the defendant reveal himself completely to counsel and take an active role in saving his own life."

Id. at 321-22. An incompetent defendant will be unable to provide the information that counsel needs to mitigate a sentence of death.

A second aspect of the defendant's participation at sentencing is the defendant's personal appearance before the sentencing jury and the opportunity to address it. Professional standards require counsel to "consider having the client testify or speak during the closing argument of the sentencing phase." NLADA Std. 11.8.6(d); ABA Guideline 11.8.3(D). As Justice Kennedy notes in *Riggins*, a sentencing jury "must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness." *Riggins*, 504 U.S. at 144 (Kennedy, J., concurring). Thus, "assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies." *Id.* (citation omitted). An incompetent defendant is not capable of appearing before the jury and expressing the sentiments that are critical to the jury's sentencing judgment. In a very real sense, such a defendant is not present at sentencing at all.

2. There is a great risk that incompetent defendants will be unable to prove their incompetency by the heightened standard of clear and convincing evidence.

Incompetency is often difficult to prove. In requiring the State to establish the criteria for civil commitment by clear and convincing evidence, the Court acknowledged that "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations." *Addington v. Texas*, 441 U.S. 418, 430 (1979). Indeed,

> "[p]sychiatric diagnosis . . . is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician. This process

> often makes it very difficult for the expert physician to offer definite conclusions about any particular patient."

Id. Although the Oklahoma court quoted this language from *Addington*, the court found just the opposite and concluded that "[a] truly incompetent defendant, through his attorneys and experts, can prove incompetency with relative ease." *Cooper v. State*, 889 P.2d 293, 303 (Okla. Crim. App. 1995). This conclusion is difficult to understand because, just like the procedure to commit a person involuntarily, the court procedure to determine competency also requires psychiatric analysis. *See* Okla. Stat. Ann. tit. 22, § 1175.4 (West 1995 supp.).

In *Addington*, the Court recognized that mental status could be quite difficult to prove and thus the burden of proving the criteria for commitment by a heightened standard was placed upon the State. The burden was placed on the State, instead of the individual, because of the "significant deprivation of liberty" and "adverse social consequences" caused by involuntary civil commitment. *Addington*, 441 U.S. at 425-26. The Court acknowledged that

> "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"

Id. at 423, *quoting In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). Given the substantial risk of error in establishing an individual's mental status and given the strong interest in being free from commitment, it was appropriate in *Addington* that the risk of error be borne by the State.

Addington is just one example of the State being required to meet a heightened standard of proof due to the significant individual interests at stake. Other such cases include *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights), *Woodby v. INS*, 385 U.S. 276 (1966) (deportation), and *Chaunt v. United States*, 364 U.S. 350 (1960) (denaturalization). In all of these instances, a heightened burden was required to protect the individual against governmental actions.

The decision below turns *Addington* and these cases on their heads. The allocation of such a high standard of proof to the accused simply means that the defendant bears the risk of error. In this circumstance, it means that many factually incompetent defendants will be forced to trial simply because they will be unable to prove their own incompetency.

3. The State's interest in protecting society through a prompt trial judgment is tempered by the confinement of a defendant who is unfit to stand trial.

The State of Oklahoma has a legitimate interest in bringing an accused to trial, and attempting to impose a criminal sanction, in a reasonably prompt fashion. There are several classic purposes for criminal punishment, including incapacitation, deterrence, rehabilitation and retribution. *See* W. LaFave & A. Scott, Criminal Law § 1.5(a) (2d ed. 1986). These purposes are not necessarily thwarted when an accused is incompetent to stand trial and the criminal processes are suspended.

In Oklahoma, as in other jurisdictions, "[i]f the defendant is found incompetent, the criminal proceedings are suspended and he is invariably committed to a mental institution until he recovers." LaFave & Scott, § 4.4(a); *see also* Okla. Stat. Ann. tit. 22, § 1175.6 (West 1995 Supp.) (if person is incompetent and capable of achieving competence, "the court shall remand the person" to mental health custody and a person who is unfit to stand

trial on charges punishable by death or life imprisonment "shall be placed in a maximum security ward"); 18 U.S.C. § 4241 (1994) (if defendant is found incompetent, the court shall commit the defendant to custody). There are limits on the period of time that an accused may be held solely on the basis of incompetency. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (defendant may be held for "the reasonable period of time necessary to determine" whether she or he will be competent in the foreseeable future). Nevertheless, if a person remains incompetent even after that period, he or she may be civilly committed. *Id.*

The State's interest in promptly punishing an offender is tempered by the fact that an incompetent defendant is confined. That confinement satisfies the State's goal of incapacitation. The other classic purposes of punishment are also served, though to somewhat lesser extents. As the Court has stated, "commitment to a mental hospital 'produces a massive curtailment of liberty.'" *Vitek v. Jones*, 445 U.S. 480, 491 (1980), *quoting Humphrey v. Cady*, 405 U.S. 504, 509 (1972). This involuntary commitment in a facility that provides mental health care will have some deterrent, rehabilitative and even retributive effect. The State has a legitimate interest in obtaining a prompt adjudication. But the State's interest is diminished by the custodial confinement that invariably follows a finding of incompetency.

C. The common law tradition and contemporary norms support the preponderance of the evidence standard.

It is well established that at common law a capital criminal defendant could not stand trial if he or she was incompetent. As Blackstone writes, "if a man in his sound memory commits a capital offense, and, before arraignment for it, he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought." 4 W. Blackstone, Commentaries *24. Hale similarly relates,

> [i]f a man in his sound memory commits a capital offence, and before his arraignment he becomes absolutely mad, he ought not by law be arraigned during such his phrenzy . . . [a]nd if such person after his plea, and before his trial, become of *non sane memory*, he shall not be tried . . . for were he of sound memory, he might allege somewhat in stay of judgment or execution."

M. Hale, 1 Pleas of the Crown *34-*35 (1680);[11] *see also* W. Hawkins, 1 A Treatise of the Pleas of the Crown 1716-1721 2 (P.R. Glazebrook, ed., 1973) ("And it seems agreed at this Day, That if one who has committed a capital Offence, becomes *Non Compos* before Conviction, he shall not be arraigned"). In England, this common law tradition in capital cases was made applicable in 1800 to defendants charged with all crimes. *See* 39 & 40 Geo. III, c. 94, § 2.

Early American cases followed these principles. *See, e.g., Youtsey v. United States*, 97 F. 937, 940 (6th Cir. 1899) ("It is fundamental that an insane person can neither plead to an arraignment, be subjected to a trial, or, after trial, receive judgment, or, after judgment, undergo punishment"); *State v. Reed*, 7 So. 132 (La. 1889) ("It is elementary that a man cannot plead, or be tried or convicted or sentenced, while in a state of insanity"); *Crocker v. State*, 60 Wis. 553, 556-57 (1884) ("At common law, if a person, after committing a crime, became insane, he was not arraigned during his insanity, but was remitted to prison until such incapacity was removed . . . Our statute has adopted substantially the same practice"); *Guagando v. State*, 41 Tex. 626, 630 (1874) ("No person who becomes insane after he has committed an offense shall be tried for the same while in such

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[11] Hale's (and, presumably, Blackstone's) use of the term "memory" "does not relate to recollection, but to a state of mind." *R. v. Podola*, [1959] 3 All E.R. 418, 431.

condition", *quoting* the State's criminal code); *Taffe v. State*, 23 Ark. 34, 36 (1861) ("The first principles of the elementary books are, that whenever a person is disqualified from defending himself, by the loss or want of reason, he shall not be the subject of a legal prosecution or penalty").

An historical analysis of the common law tradition demonstrates clear links between the procedures established to determine sanity of an individual in the civil and criminal contexts. Sir Matthew Hale writes of the presumptions of sanity in civil and criminal proceedings and notes that "every person of the age of discretion is presumed of *sane memory*, unless the contrary be proved; and this holds as well in cases civil as criminal." Hale at *33. With respect to criminal responsibility, Hale continues,

> if a man be a lunatic, and hath his *lucida intervalla*, and this be sufficiently proved, yet the law presumes the acts or offenses of such a person to be committed in those intervals, wherein he hath the use of reason, unless by circumstances or evidences it appears they were committed in the time of his distemper; and this also holds in civils as well in criminals."

Id. at *33-*34.

In the criminal context, the jury had the responsibility to determine competency before the accused went to trial. British historian Nigel Walker has studied the role of the jury at common law in assessing competency of the criminal defendant. Walker relates that an "inquest of office" was held and "although it was to be held by twelve jurors, [it] was modelled not on the petty jury . . . but on the civil inquests which were held as a result of writs from the Chancellor 'de lunatico inquirendo', and which decided whether the subject of the writ was mentally competent to manage his own affairs." N. Walker, 1 Crime and Insanity in England: The Historical Perspective 221 (1968). Thus, when it became

necessary to determine "whether a Criminal, who at his Trial is in appearance a Lunatick, be such in Truth or not, it shall be tried by an Inquest of Office, to be returned by the Sheriff of the County wherein the Court sits . . . ." Hawkins, at 2.

These procedures were maintained in place by statute in 1800, when the common law competency rules were extended from capital cases to all criminal cases. English law then provided:

> "That if any Person indicted for any Offence shall be insane, and shall upon Arraignment be found to be by a Jury lawfully impannelled for that Purpose, so that such Person cannot be tried upon such Indictment, or if upon the Trial of any Person so indicted such Person shall appear to the Jury charged with such Indictment to be insane . . . . it shall be lawful for such Court to order a Jury to be impannelled to try the Sanity of such Person . . . ."

39 & 40 Geo. 3, ch. 94, § 2. Nineteenth-century English decisions reveal that courts adhered to this practice. *See, e.g., R. v. Turton*, 6 Cox. C.C. 385 (1854) (judge empaneled a jury to determine whether the accused was competent to plead); *R. v. Davies*, 6 Cox C.C. 326, 175 Eng. Rep. 575 (1853) (same).

It is highly significant that common law competency determinations in criminal cases were modeled on civil proceedings. As early as 1571, it was understood that the standard of proof in civil matters was a preponderance of the evidence. In that year, Chief Justice Dyer and a majority of the other judges of the Common Pleas distinguished the standard by which pre-trial pleadings were measured from the standard of proof in civil trials. They held that when a case has proceeded to trial,

> "so that the jury is to give a verdict one way or

> the other, there, if the matter is doubtful, they may found their verdict upon that which appears the most probable, and by the same reason that which is most probable shall be good evidence."

Newis v. Lark, 75 Eng. Rep. 609, 621 (1571). Almost three hundred years later, the holding in *Newis* was relied upon by Judge Willes, in a dispute before the House of Lords, for the proposition that "in civil cases the preponderance of probability may constitute sufficient grounds for a verdict." *Cooper v. Slade*, 27 L.J.Q.B. (n.s.) 449, 457 (1858). Judge Willes' statement has been characterized as "the classic pronouncement on the subject." *R. v. Carr-Braint*, [1943] 2 All E.R. 156, 158 (quoting both Judge Willes and *Newis v. Lark*).

The actual language employed by the English trial judges also establishes that preponderance of the evidence was the common law standard to decide competency to stand trial. In *R. v. Frith*, 22 Howell's St. Tr. 307 (1790), defense counsel questioned the competency of the accused, who was charged with high treason for throwing a stone at the King's coach. A jury was empaneled and was instructed by the court to "diligently inquire . . . whether John Frith, the now prisoner at the bar . . . be of sound mind and understanding *or not*, and a true verdict give according to the best of your understanding . . . ." *Frith*, at 311 (emphasis added). Similarly, in *R. v. Dyson*, 173 Eng. Rep. 135 (1831), the judge, quoting Hale, impaneled a jury "to inquire *ex officio* touching such insanity, and whether it be real *or* counterfeit." *Dyson*, 173 Eng. Rep. at 136 (emphasis added). The judge stated that "if *they were satisfied* that the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane." *Id.* (emphasis added). The role of the jury is further illustrated in *R. v. Pritchard*, 173 Eng. Rep. 135 (1836), where the jury was directed to determine "whether the prisoner is mute of malice *or not*; secondly, whether he can plead to the indictment *or not*; thirdly, whether he is of sufficient intellect to

comprehend the course of proceedings on the trial . . . ." *Pritchard*, 173 Eng. Rep. at 135. (emphasis added).

This phrasing of instructions in the alternative, competent "or not," indicates that the jury was to find one way or the other, based upon the greater weight of the evidence. This meaning is unmistakable when one understands that competency determinations were treated as civil proceedings, that the standard of proof in civil proceedings was understood to be a preponderance of evidence, and that the juries were not instructed to apply any standard other than preponderance of the evidence. This meaning is confirmed by later English authority. The court in *R. v. Podola*, [1959] 3 All E.R. 418 (Lord Parker, C.J.), held that

> "there is in our judgment a burden on the defence of satisfying the jury of the accused's [incompetency]. In such a case, as in other criminal cases in which the onus of proof rests on the defence, the onus is discharged if the jury are satisfied on the balance of probabilities that the accused's [incompetency] has been made out."

Podola, 3 All E.R. at 429. The *Podola* court stated that "[t]hese principles are in accordance with those laid down in a number of cases", including *Pritchard*, *Dyson*, and *Turton*. *Id.*

Finally, contemporary norms in the allocation of burden of proof of proving incompetency support the use of the preponderance of the evidence standard. In his brief, Petitioner establishes that the overwhelming majority of American jurisdictions currently place no greater burden on the defendant than preponderance of the evidence. The American Bar Association standards also recommend proving competency to stand trial by "the greater weight of the evidence", and not by a higher standard. ABA Mental Health Std. 7-4.8(c)(2).

In determining whether a State's burden of proof violates

the Due Process Clause, the Court considers the relative interests of the parties, historical tradition, and contemporary norms. The accused has a compelling interest in being tried and sentenced while competent, and a lawyer for an incompetent defendant cannot render effective assistance. The State's interest in a prompt trial judgment is greatly overshadowed by the injustice of trying and sentencing an incompetent defendant. Furthermore, both common law tradition and contemporary norms support a preponderance of the evidence standard for determining competency. Therefore, the Court should find that Oklahoma's heightened clear and convincing evidence standard is a violation of the Due Process Clause.

II. The Heightened Standard To Prove Mental Incompetency Is A State-Imposed Procedural Barrier To The Consideration Of Relevant Mitigating Evidence, Which Violates The Eighth and Fourteenth Amendments.

A capital sentencing must be individualized, with a full opportunity for the defendant to present mitigating evidence. In *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Court struck down a statute that required the death penalty for first-degree murder since the Eighth Amendment "requires consideration of the character and record of the individual offender . . . as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304 (Opinion of Stewart, Powell, and Stevens, JJ.). Whatever the procedure in a non-capital case, "the penalty of death is qualitatively different from a sentence of imprisonment" and "there is a corresponding difference in the need for reliability" in the imposition of a sentence of death. *Id.* at 305; *see also Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (noting that many limits on capital punishment "are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion.")

Since the *Woodson* decision, the Court has sought to

ensure that capital proceedings are individualized and, hence, reliable, by striking down barriers to the presentation of mitigating evidence. In *Lockett v. Ohio*, 438 U.S. 586 (1978), a plurality of the Court found that a statute unduly restricted the consideration of mitigating evidence. As the plurality held, the sentencer must not be precluded from considering "any aspect of a defendant's character or record" as a mitigating factor. *Lockett*, 438 U.S. at 604. The *Lockett* rule was affirmed by a majority of the Court in *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982). In *Eddings*, a death sentence was overturned where the trial judge instructed the jury that it could not consider mitigating evidence of the defendant's family history. *Id.* at 112-17. As the Court held, the sentencing jury "may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." *Id.* at 114-15. The Court has applied the *Lockett* rule to invalidate a variety of obstacles to the consideration of mitigating evidence. *See, e.g., McKoy v. North Carolina*, 494 U.S. 433 (1990) (vacating a death sentence where the jury was instructed to make unanimous findings on each mitigating circumstance and to consider only those circumstances); *Mills v. Maryland*, 486 U.S. 367 (1988) (overturning a death sentence where the jury may have believed that unanimity was required to consider mitigating evidence); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (striking down a statute that limited the categories of mitigating evidence); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (reversing a death sentence where the trial judge excluded mitigating evidence of the defendant's good adjustment in prison).[12]

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[12] Of course, that a sentencing authority must be permitted to consider all relevant mitigating evidence does not mean that a capital sentencing hearing must be without direction. The State may promulgate rules of procedure to guide the presentation of evidence and to channel the exercise of sentencing discretion. Thus, in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), the Court upheld a statute that required the jury to sentence the defendant to death if the aggravating circumstances

(continued...)

Thus, under *Lockett* and its progeny, the sentencing authority must be permitted to consider all types of relevant mitigating evidence. While the State may enact procedures to guide the presentation of this evidence, it may not erect a barrier to the jury's consideration of particular mitigating circumstances. The standard for evaluating a *Lockett* rule violation in this context is whether the error may be deemed harmless beyond a reasonable doubt. *Clemons v. Mississippi*, 494 U.S. 738, 753 (1990).[13]

The Oklahoma legislature has erected a significant structural barrier to the consideration of mitigating evidence. Just as the State may not exclude whole categories of mitigating evidence or provide, for example, that the defendant be sentenced *in absentia*, so too the legislature may not substantially curtail the defendant's own participation at sentencing. *Amicus curiae* has already explained the importance of the defendant's ability to appear personally before the sentencing authority and to work with counsel to present a case in mitigation. By requiring Mr. Cooper to prove his own incompetency by a heightened standard, and by

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[12](...continued)
outweighed any mitigating circumstances. Because the statute did not prevent the jury from considering relevant mitigating evidence, there was no violation of the *Lockett* rule. *Blystone*, 494 U.S. at 308; *see also Johnson v. Texas*, __ U.S. __, 113 S.Ct. 2658, 2669 (1993) (affirming a death sentence where the defendant's youth was considered in the context of his future dangerousness, but was not altogether eliminated from the jury's consideration); *Romano v. Oklahoma*, __ U.S. __, 114 S.Ct. 2004, 2011 (1994) (no claim was made that defendant was precluded from presenting mitigating evidence, but the Court held that "[t]he Eighth Amendment does not establish a federal code of evidence . . . in capital sentencing proceedings").

[13] By comparison, if there is instructional error, "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990).

proceeding to trial and sentencing Mr. Cooper in the face of evidence that he was unable to assist his counsel, the State erected a constitutionally unacceptable barrier to the presentation of mitigating evidence. This barrier cannot be deemed harmless beyond a reasonable doubt. The Court should, therefore, vacate the sentence of death.

CONCLUSION

For the reasons set forth in this brief, *amicus curiae* respectfully asks this Court to reverse the decision below.

Respectfully submitted,

October 15, 1995

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No. 95-5207

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

BYRON KEITH COOPER, Petitioner

v.

THE STATE OF OKLAHOMA, Respondent.

On Writ of Certiorari
To the Oklahoma Court of Criminal Appeals

BRIEF FOR UTAH, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IDAHO, KANSAS, MISSISSIPPI, NEBRASKA, NEVADA, NEW MEXICO, OHIO, PENNSYLVANIA, RHODE ISLAND, AND VIRGINIA, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

(capital penalty case)

May a State constitutionally require a criminal defendant who alleges incompetency to stand trial to prove such incompetency by clear and convincing evidence?

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No. 95-5207

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

BYRON KEITH COOPER, Petitioner

v.

THE STATE OF OKLAHOMA, Respondent.

On Writ of Certiorari
To the Oklahoma Court of Criminal Appeals

BRIEF FOR THE STATES OF UTAH, ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI*

Amici States, through their respective attorneys general, share an interest in preserving a cornerstone principle of federalism: that States be permitted reasonable latitude to develop criminal prosecution procedures that promote speedy and just trial of serious crimes. At the same time, *amici* acknowledge their commitment to obey the constitutional command that a criminal defendant not be tried unless he or she understands the nature of the proceedings, and is

reasonably able to assist defense counsel. *See Dusky v. United States*, 362 U.S. 402 (1960) (per curiam).

STATEMENT OF THE CASE

Amici adopt the case statement of respondent State of Oklahoma. We observe that the evidence of Cooper's guilt appears compelling, while evidence of Cooper's incompetency to stand trial is weak. On direct appeal, the Oklahoma Court of Criminal Appeals found the record to be "virtually brimming with evidence Appellant was malingering." *Cooper v. State*, 889 P.2d 293, 313 (Okla. Crim. App. 1995).

Amici note Oklahoma's recitation that the trial court found Cooper incompetent in August 1990, and ordered him hospitalized. Several months later, the court found Cooper competent, applying Oklahoma's presumption of competency and finding that presumption not overcome by "clear and convincing" evidence. In his merits brief, Cooper does not emphasize the August 1990 incompetency finding; he simply argues that the "clear and convincing" incompetency proof standard is unconstitutional in all situations. Following suit, this brief responds to that general argument.

SUMMARY OF ARGUMENT

Consistent with its stated due process approach, this Court should deferentially review Oklahoma's statutory requirement of clear and convincing proof for incompetency to proceed. Deference is also proper because Cooper facially challenges Oklahoma's proof standard, which requires him to demonstrate that the statute could not be constitutional under any circumstance. Further, trial competency and related issues are now governed by a comprehensive matrix of constitutional law; federalism principles counsel respect for State lawmaking in the interstices of this legal matrix.

The "clear and convincing" incompetency proof standard reasonably accommodates conflicting legal and pragmatic pressures. The public and criminal defendants have a powerful interest in expeditious criminal prosecutions. Criminal defendants also have an interest against being erroneously found incompetent. Requiring that incompetency be clearly and convincingly proven, rather than proven merely by a preponderance of evidence, protects all these interests. Additionally, constitutional rules governing competency-related issues can create a dispositional "limbo" in which a defendant may be found incompetent to proceed, yet the State is barred from effectively treating the defendant to restore competency. This problem may be reduced by requiring that incompetency to proceed be proven by clear and convincing evidence, which is also the constitutionally required proof standard for civilly committing mentally ill persons.

The requirement that incompetency be clearly and convincingly proven does not impair basic rights of a criminal defense. Most particularly, a defendant remains entitled to an inquiry whenever a doubt exists about competency; this reduces the risk that a truly incompetent defendant will be tried and convicted. And the "clear and convincing" incompetency proof standard does not affect the right to raise mental illness-related defenses at trial. In fact, because the "clear and convincing" standard guards against compelled psychotropic medication of a criminal defendant, it can aid such defenses by its tendency to assure that the defendant's baseline mental condition will be observed at trial. In light of all these concerns, it is reasonable, and constitutional, to require clear and convincing proof of incompetency to proceed.

ARGUMENT

THE "CLEAR AND CONVINCING" STANDARD FOR PROVING INCOMPETENCY SERVES IMPORTANT INTERESTS AND REASONABLY ACCOMMODATES CONFLICTING LEGAL AND PRAGMATIC PRESSURES; THEREFORE, IT IS CONSTITUTIONAL

At the outset, *Amici* acknowledge the problem seemingly posed by this case: By requiring that incompetency to proceed be proven by "clear and convincing" evidence, Oklahoma's statute, Okla. Stat. Ann. tit. 22 § 1175.4B (Supp. 1995), requires a criminal defendant who is "more likely than not" incompetent, yet is not "clearly and convincingly" so, to face trial. This problem forms the basis for Cooper's arguments before this Court.

Despite this apparent problem, Oklahoma is not alone in requiring "clear and convincing" proof of incompetency. Connecticut, Pennsylvania, and Rhode Island also use this standard. Conn. Gen. Stat. § 54-56d(b) (1995); Pa. Stat. Ann., Tit. 50, § 7402(c), (d) (Supp. 1995); R.I. Gen. Laws. § 40.1-5.3-3 (Supp. 1994). The remaining States, by statute or case law, generally utilize the "preponderance" standard (see appendix I of this brief). The question, then, is whether constitutional principles permit the "clear and convincing" standard for proving incompetency. *Amici* respectfully answer in the affirmative.

I

Amici begin by identifying the parameters of the constitutional analysis. Several important principles define the nature of this Court's review.

A

First, the pertinent constitutional provision is the Due Process Clause, U.S. Const. Amend. XIV. Cooper raises both Due Process and Eighth Amendment-based challenges to the "clear and convincing" standard for proving incompetency. However, the latter provision is not implicated, because the question of competency to proceed arises prior to a guilt finding. *See Ingraham v. Wright*, 430 U.S. 651, 671-72 n. 40 (1977) (Eighth Amendment scrutiny not triggered absent criminal conviction). A separate body of Eighth Amendment law addresses incompetency to be executed. *See Ford v. Wainwright*, 477 U.S. 399 (1986). Therefore, just as criminal trial of an incompetent person is barred solely by due process, *Drope v. Missouri*, 420 U.S. 162, 172-73 (1975), the manner in which a State decides competency to proceed--even in a capital case--involves only due process analysis.

B

Next, *amici* will not address whether Oklahoma's particular definition of "clear and convincing" evidence makes that burden of proof heavier than understood by this Court in *Addington v. Texas*, 441 U.S. 418 (1979). In *Addington*, this Court described "clear and convincing" proof as an "intermediate" standard, between the traditional civil "preponderance" standard and the criminal "beyond reasonable doubt" standard. *Id.* at 424. Cooper argues that only the

lighter "preponderance" standard may be used to determine incompetency to proceed. However, he also contends that as defined by Oklahoma's stock jury instruction at the time of his competency inquiry, "clear and convincing" proof may pose a heavier burden than understood by this Court in *Addington* (Br. of Petitioner at 28). *Amici* respectfully defer to the arguments of Cooper and of Oklahoma to decide the latter contention. For purposes of this brief, the *amici* States presume that clear and convincing proof is an intermediate standard, as stated in *Addington*. We will argue that so understood, it is an appropriate standard for deciding that a defendant is incompetent to proceed.

C

Turning to the standard of review, *amici* observe that Cooper's burden of persuasion before this Court is very heavy, for two reasons. First, it appears from the Oklahoma court's opinion and from Cooper's certiorari petition that Cooper facially attacks Okla. Stat. Ann. tit. 22 § 1175.4B; no "as applied" argument is offered. Cooper's opening merits brief is also broadly framed, articulating no "as applied" analysis. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no* set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added).

Second, this Court has held that State legislative decisions receive judicial deference under the Due Process clause. Unless a statute compromises a deep-rooted, common law rule, this Court will not strike it merely because some reasonable person might find the legislature's decision unwise. The Court followed this principle in *Medina v.*

California, 505 U.S. 437 (1992), when it approved California's decision to allocate the burden of proving incompetency to proceed upon the party alleging incompetency--in that case, the defendant. "[A] state procedure 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar.'" *Id.* at 451 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

Deference to Oklahoma's legislative judgment is particularly appropriate in this case. Just as common law does not allocate the burden of proof to either party, *Medina*, 505 U.S. at 446-47, there appears to be no common law rule for degree of proof in competency-to-proceed inquiries. Deeming such inquiries analogous to ordinary civil proceedings, the "preponderance" standard has been applied, but no searching rationale for this practice has been expressed. *See* Charles E. Torcia, Wharton's Criminal Procedure § 426, at 785 & n. 20 (13th ed. 1991). *Compare Drope*, 420 U.S. at 171 (explaining common law basis of rule against trial of incompetents). *See also* Bruce J. Winick, Restructuring Competency to Stand Trial, 32 U.C.L.A. L. Rev. 921, 968 (1985) ("A procedural due process right to a determination of competency is not the equivalent of a substantive due process right to be immune from trial while incompetent . . ."). Therefore, assignment of the "clear and convincing" standard for proving incompetency does not, by itself, compromise any deep-rooted right.

Further, a detailed matrix of rules already exists for assessing competency to proceed. If competency is in doubt, a trial court must undertake an inquiry. *See Drope*, 420 U.S. at 173 ("reasonable cause" to doubt competency requires

inquiry); *Pate v. Robinson*, 383 U.S. 375, 385 (1966) ("bona fide question" requires inquiry). The States have painstaking procedures for competency inquiries, generally similar to recommendations of the Model Penal Code and the American Bar Association (see appendix I of this brief). The inquiry includes careful clinical evaluation, aided if necessary by inpatient observation. After clinical evaluation, there is a court hearing to legally determine whether the defendant is competent. Model Penal Code §§ 4.04 through 4.06 (1985); II American Bar Ass'n, Standards for Criminal Justice §§ 7-4.1 through 7-4.15 (2d ed. 1986). *See also* Okla. Stat. Ann. tit. 22 §§ 1175.2 through 1175.8 (1986 & Supp. 1995).

This rule matrix extends to related issues. Under the Constitution, a State has very limited authority to compel a criminal defendant to take psychotropic medication--even if arguably necessary to maintain competency. *Riggins v. Nevada*, 504 U.S. 127, 135 (1992). Additionally, a State cannot confine an incompetent defendant indefinitely; if competency cannot be restored within a reasonable time, the State must initiate civil commitment proceedings, or else release the defendant. *Jackson v. Indiana*, 406 U.S. 715, 731-39 (1972). Civil commitment, in turn, requires "clear and convincing" proof, generally of mental illness plus dangerousness. *Addington*, 441 U.S. at 433. A defendant who is tried and acquitted on insanity-type grounds can only be confined so long as he or she remains both mentally ill and dangerous. *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992). If a convicted defendant appears mentally ill, notice and an adversary hearing are required before involuntary transfer to a mental health facility can occur. *Vitek v. Jones*, 445 U.S. 480, 495 (1980). There are also constitutional limits on prison authorities' ability to control disruptive inmate

behavior with psychotropic medication. *Washington v. Harper*, 494 U.S. 210, 227 (1990).

Given this extensive rule matrix, maximum deference should be granted to State decisions in the remaining interstices of the law dealing with competency and related issues. "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington*, 441 U.S. at 431. *Cf. United States v. Lopez*, ___ U.S. ___, 115 S. Ct. 1624, 1626 (1995) ("first principles" of federalism counsel against excessive federal government intrusion into areas of primary state responsibility). Put another way, the decision of Oklahoma and several other States to require "clear and convincing" proof of incompetency need only "adequately" protect the core requirement that incompetent persons not face criminal trial, *Drope*, 420 U.S. at 172; it need not be a perfect or ideal choice, *Medina*, 505 U.S. at 451. Therefore, if any reasonable justification can be found for that decision, this Court should uphold it.

II

As *amici* now demonstrate, several such justifications exist. These justifications are based upon important public interests--interests that are arguably shared by criminal defendants. They also relate to circumstances that can be created by the above-described matrix of related law.

A

First, the States have a powerful, legitimate interest in trying criminal cases expeditiously. *See Winston v. Lee*, 470 U.S. 753, 762 (1985) ("the community's interest in fairly and

accurately determining guilt or innocence . . . is of course of great importance"); *Illinois v. Allen*, 397 U.S. 337, 347-48 (1970) (Brennan, J., concurring) ("Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace"); *Cooper*, 889 P.2d at 303 ("The State has great interest in assuring its citizens a thorough and speedy judicial process . . ."). And, of course, criminal defendants have a constitutional right to a "speedy trial," U.S. Const. Amend. VI. Whenever a criminal trial is delayed, the preservation of evidence, and hence accuracy of the trial proceedings, becomes a problem for both parties.

It therefore is reasonable to assign a proof standard for incompetency to proceed that reduces the risk of an erroneous incompetency finding, and thereby reduces the risk of an unnecessary trial delay. The "preponderance" standard admits a high risk of an erroneous incompetency finding. *See Addington*, 441 U.S. at 426-27 ("preponderance" standard for civil commitment permits unacceptable risk of erroneous confinement). It therefore permits a high likelihood that a criminal trial will be unnecessarily delayed--that is, delayed beyond the time needed for the competency inquiry, which is required once the defendant's competency comes into doubt. The "clear and convincing" standard to prove incompetency requires that such doubt be strongly confirmed; put another way, it strengthens the presumption of competency. The standard therefore reasonably requires that if trial must be delayed because of defendant incompetency, the resulting deferral of justice will be strongly justified.

The "clear and convincing" standard for proving incompetency is also supported by the uncertainty of psychiatric diagnosis. *See Medina*, 505 U.S. at 451 (citing

Addington, 441 U.S. at 430). It often happens--as it did in this case--that examining clinicians will disagree whether the defendant is competent to proceed. Winick, 32 U.C.L.A. L. Rev. at 966 ("Many cases will be on the borderline of competency"). It is reasonable to compensate for that scientific uncertainty by requiring "clear and convincing" legal certainty in order to find a defendant incompetent to proceed. In *Addington*, based upon individual liberty concerns, this Court required that civil commitment be justified by clear and convincing evidence. Similarly powerful concerns for expeditious and accurate criminal proceedings support a similar certainty level for an incompetency finding.

These concerns are not limited to States' interests. A defendant might seek an incompetency finding in order to delay, or altogether avoid, trial on the merits; such behavior is consistent with both clinical and legal definitions of malingering. *See* American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) (DSM-IV), at 683; Black's Law Dictionary (6th ed. 1990), at 959. However, it has also been reported that a prosecutor might allege incompetency in order to keep a defendant "off the streets" if evidence of guilt is weak. *See* II American Bar Ass'n, A.B.A. Standards for Criminal Justice, at 7.163-64; *id.* § 7-4.2, at 7.182 (2d ed. 1986). Defense counsel or prosecutors might challenge competency in order to delay a prosecution while publicity cools down, or merely to temporarily relieve their heavy workloads. Such actions harm the interests the public and defendants alike: this Court has taken notice that the "stigma" caused by involuntary mental health commitment harms even convicted criminals. *Vitek*, 445 U.S. at 492. Because the "clear and convincing" proof standard must be satisfied by the party alleging incompetency

to proceed, *e.g.*, Okla. Stat. Ann. tit. 22 §§ 1175.2A, 1175.4B (1986 & Supp. 1995), it serves the interests of both the States and criminal defendants.[1]

B

Next, in light of *Vitek*, *Jackson*, and *Addington*, there is legal tension between finding a defendant incompetent to proceed, and then, based upon such finding, initiating mental health treatment to restore competency. In *Vitek*, 445 U.S. at 491-94, this Court held that a convicted felon has a liberty interest against involuntary commitment for mental health treatment; therefore, exacting process must be followed for such commitment. *Id.* at 494-95 (approving process that includes notice, hearing, counsel, written findings). In *Jackson*, 406 U.S. at 731-39, the Court prohibited indefinite confinement of unconvicted incompetent defendants in mental institutions; if competency cannot be restored within a reasonable time, such defendants must either be released or referred for civil commitment--which, under *Addington*, requires "clear and convincing" proof.

Reading these cases, a legislature could conclude that pretrial treatment to restore mental competency requires strong justification, and must also be completed expeditiously. A legislature could also recognize that a defendant who is adjudicated incompetent may also be unable to voluntarily

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[1]The concern about erroneously finding a defendant incompetent to proceed is sufficiently powerful that at least one State--Utah--provides for a defendant's pretrial appeal of such finding as a matter of right. Utah Code Ann. § 77-18a-1(1)(d) (Supp. 1995). No such appeal is allowed from a finding of competency; nor does the prosecution have a guaranteed pretrial appeal from a finding of competency or incompetency.

consent to such treatment. An incompetency finding by a mere preponderance of the evidence might not justify involuntary mental health treatment, which normally requires clear and convincing proof. A legislature could thus perceive a legal and clinical "limbo" that is to nobody's legitimate benefit. *See* Winick, 32 U.C.L.A. L. Rev. at 945-46. But if a defendant is found incompetent by clear and convincing proof, he or she more likely also meets the clear and convincing standard for nonconsensual but clinically necessary treatment to restore competency. Indeed, in his opening merits brief to this Court, Cooper suggests that his alleged mental condition should have been "treated aggressively" (Br. of Petitioner at 10). To aid State authority to provide such treatment, a legislature could reasonably apply the "clear and convincing" requirement to pretrial incompetency findings.

In fact, the Connecticut legislature applied similar reasoning, impelled in part by a federal district court decision, *De Angelas v. Plaut*, 503 F. Supp. 775 (D. Conn. 1980), that struck that State's statute governing the confinement of incompetent criminal defendants. In *De Angelas*, the federal court struck down Connecticut's six-month review period for defendants committed to mental institutions due to incompetency, because the commitment statute did not require findings that competency could be restored within that period, and therefore violated the *Jackson* rule. 503 F. Supp. at 781. The State legislature then extensively revised its mental health laws to comply with the federal court's mandate. Besides solving the *De Angelas* problem, the legislature added the "clear and convincing" standard for incompetency to proceed. That decision was based upon the legislature's understanding of *Addington*, explained by legislative witnesses: "I would like to point out that the clear and convincing standard that

is in the proposal came out of the Supreme Court's decision in Mattington [sic: Addington] v. Texas dealing with the standard that's required for civil commitment." Conn. Public Act 81-365, S.B. 1066, tr. of Judiciary Committee Hrg. (Mar. 3, 1981), at 770, comments of witness McCullough (excerpted in appendix II of this brief); *id.* at 768 (comments of witness Zonana).[2]

This Court's *Riggins* decision adds a new, fair trial-related dimension to the legal tension between finding a defendant incompetent and attempting to restore competency. In *Riggins*, this Court reversed the capital murder conviction of a defendant who was involuntarily treated with the psychotropic medication Mellaril (thioridazine) prior to and during trial; thus medicated, the defendant raised an insanity defense, which the jury rejected. This Court held that the compelled administration of psychotropic medication, not proven "necessary to accomplish an essential state policy," 504 U.S. at 138, violated the defendant's Sixth and Fourteenth Amendment rights to effective counsel and a fair trial. That holding was supported by the possibility that the medication negatively affected the defendant's appearance, testimony, and ability to follow the proceedings and consult with counsel. *Id.* at 137. Along the way, Court suggested that a "less intrusive alternatives" inquiry is required before a criminal defendant can be compelled to take psychotropic medication while trial is under way. *Id.* at 135-36.

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[2]Full copies of the Connecticut legislative history are being lodged with the Clerk of this Court and provided to counsel for the main parties to this case. No similar, published legislative history has been found regarding Oklahoma's, Pennsylvania's, and Rhode Island's adoption of the "clear and convincing" incompetency proof standard.

Riggins thus poses a special dilemma for State lawmakers, who know that in order to be effective, treatment to restore mental competency will commonly require psychotropic medication. *See* Winick, 32 U.C.L.A. L. Rev. at 945; American Psychiatric Ass'n, Practice Guidelines for the Treatment of Patients with Substance Use Disorders: Alcohol, Cocaine, Opioids, Am. J. Psychiatry Vol. 152, No. 11, at 7-9, 29-30, 36-37, 40-42 (Nov. 1995 Supplement); American Psychiatric Ass'n, Practice Guidelines for the Treatment of Patients with Bipolar Disorder, Am. J. Psychiatry Vol. 151, No. 12, at 5-14 (Dec. 1994 Supplement); American Psychiatric Ass'n, Practice Guidelines for Major Depressive Disorder in Adults, Am. J. Psychiatry Vol. 150, No. 4, at 7-11 (April 1993 Supplement); M. Mostert & R. Boshes, "Pharmacological Treatment of Schizophrenia," in Psychiatry Diagnosis & Therapy (J. Flaherty et al. 2nd ed. 1993), at 101-13. Although *Riggins* reserved the question whether psychotropic medication may be involuntarily administered to maintain defendant competency, 504 U.S. at 136, it clearly warns lawmakers that potent constitutional concerns must be overcome if such treatment can be justified.

The State of Utah has encountered this dilemma. In 1990, a noncapital murder defendant who calls himself "Captain Nemo" was adjudicated incompetent to proceed, which only requires a preponderance of the evidence under Utah Code Ann. § 77-15-5(10) (1995), and was accordingly committed to the Utah State Hospital for treatment under Utah Code Ann. § 77-15-6 (1995). While thus committed, the defendant refused psychotropic medication, and obtained a federal court order barring such treatment. *See Woodland v. Angus*, 820 F. Supp. 1497, 1500-01 (D. Utah 1993). Heavily relying upon *Riggins*, the federal court held that even though the defendant was "not competent to make an

informed medical decision" about treatment with psychotropic medication, 820 F. Supp. at 1504, and even though the State of Utah had a "significant" interest in trying him on the criminal charges, *id.* at 1511, the State could not involuntarily medicate the defendant to restore his competency. *See id.* at 1508-1519. Not until 1994 was "Captain Nemo" found competent to proceed, tried, and convicted. His state appeal is now pending, and is expected to raise both competency and "speedy trial" issues.

Cases like "Captain Nemo" add a pragmatic concern to the legal dilemma created by *Vitek*, *Riggins*, and the other above-cited case law. An incompetent criminal defendant who occupies mental hospital space while refusing efficacious treatment denies that space to somebody who may benefit from it; he or she may also endanger hospital staff and other patients. State lawmakers and the clinicians who operate mental institutions are loath to "warehouse" such individuals, by confining them without effective treatment. To help resolve all these conflicting pressures, lawmakers could select the "clear and convincing" standard for proof of a criminal defendant's incompetency to proceed. Just as this standard provides legal justification for civil commitment, it may also provide sufficient justification for clinically appropriate use of psychotropic medication to restore competency. Even if the standard does not entirely resolve such problems, it can, and should, be viewed as a reasonable, and therefore constitutional, legislative effort to do so.

III

Amici now revisit the problem acknowledged in Point I--that a defendant who is "more likely than not" incompetent may face trial. That problem is more theoretical than real,

because the "clear and convincing" incompetency proof standard operates within a procedural matrix that adequately prevents trial of a truly incompetent defendant. *See Leland v. Oregon*, 343 U.S. 790, 793 (1952) ("To determine the merits of this challenge, the statute must be viewed in its relation to other relevant [State] law and in its place in the trial of this case"). Several features are pertinent.

A

First, the "clear and convincing" standard for proving incompetency comes into play only after extensive inquiry, consisting of clinical evaluation and an adversarial, judicial hearing. That inquiry is designed to gather and present comprehensive evidence bearing upon the elements of competency: Does the defendant understand the proceedings, and can the defendant reasonably assist counsel? Given such searching inquiry, a truly incompetent defendant should readily be found clearly and convincingly so. *See Cooper*, 889 P.2d at 303 ("A truly incompetent defendant, through his attorneys and experts, can prove incompetency with relative ease"). Therefore, the clear and convincing standard is reasonable.

Next, Oklahoma's statutes, in accord with this Court's holdings in *Pate* and *Drope*, require that competency be re-considered whenever a doubt arises: "The court, at any time, may initiate a competency determination on its own motion, without an application, if the court has a doubt as to the competency of the person." Okla. Stat. Ann. tit. 22 § 1175.2A (1986). As reflected in the Oklahoma appellate court's opinion, trial counsel can re-raise the competency question at any time, and did so in this case. *Cooper*, 889 P.2d at 312. The statutes of Connecticut, Pennsylvania, and

Rhode Island are in accord. Conn. Gen. Stat. § 54-56d(c) (1995) (inquiry may be requested any time "it appears that the defendant is not competent . . ."); Pa. Stat. Ann., Tit. 50, § 7402(c), (d) (Supp. 1995) (inquiry upon "prima facie question of incompetency"); R.I. Gen. Laws § 40.1-5.3-3 (Supp. 1994) (inquiry allowed whenever "it appears that the defendant is not competent").

This ongoing duty to watch for signs of incompetency provides a "fail-safe" guard against an erroneous finding of competency that might result from an initial failure to find incompetency by clear and convincing evidence. A court's direct observations during trial will provide additional data about the defendant's mental status. *See* Winick, 32 U.C.L.A. L. Rev. at 953-54. The trial court may thus find itself clearly and convincingly persuaded that the defendant is incompetent, and stay the prosecution accordingly. Naturally, such disposition is most likely to occur if the defendant is, in the court's initial opinion, more likely than not incompetent. Conversely, the unfolding trial may dispel judicial doubts about the defendant's competency. In either instance, the trial court's contemporaneous observations will likely be placed on record, allowing fully-informed appellate review. Such was apparently the disposition in this case, allowing the Oklahoma appellate court to confirm that Cooper was not incompetent, but instead was malingering. *Cooper*, 889 P.2d at 313. These procedures substantially reduce the risk of an erroneous competency finding, and thus adequately protect the core right not to be tried while incompetent.

B

It is also important to recognize defendant's rights that are not affected by the "clear and convincing" standard to

prove incompetency. There is no infringement upon insanity-type defenses, recognized in all the States that require clear and convincing proof of incompetency to proceed. Okla. Stat. Ann. tit. 22 §§ 1161 through 1170 (1986 & Supp. 1995); Conn. Gen. Stat. § 53a-13 (1995); Pa. Stat. Ann., Tit. 42, R. Crim. P. 305C(1)(b) (1989), Tit. 42, § 7402(e)(4)(iii)-(iv) (Supp. 1995); R.I. Gen. Laws § 40.1-5.3-4 (1990). Defenses such as duress, compulsion, entrapment, and the like are not affected, or are only indirectly affected. There is no infringement upon the right to present mitigating evidence of mental disorder at sentencing. There is no impairment of the protection against executing an incompetent person--which, as earlier explained, is a discrete inquiry under *Ford v. Wainwright*, 477 U.S. 399 (1986).

In fact, some of the foregoing defenses are more likely to succeed if the defendant appears mentally impaired to the fact finder or sentencer. Concurring in the *Riggins* judgment, Justice Kennedy suggested that a criminal defendant has what might be termed a constitutional "right to appear insane" at trial, and that involuntarily medicating a defendant is akin to manipulating material evidence. 504 U.S. at 141-45 (Kennedy, J., concurring). The "clear and convincing" proof standard for incompetency to proceed favors sending a marginally competent (or marginally incompetent) defendant to trial, where he or she will be observed in a baseline, unmedicated mental condition. Given the Sixth Amendment rationale of both the main *Riggins* opinion and Justice Kennedy's concurrence, such presentation of the marginally competent defendant can actually assist the defense.

Ability to assist defense counsel is, of course, an element of competency to proceed under *Dusky*. But *Riggins* paradoxically suggests that some degree of incompetency can

itself assist the defense. Additionally, although it has suggested that an incompetent defendant is constructively "absent" from the proceedings, *Drope v. Missouri*, 420 U.S. 162, 171 (1975), this Court has also held that a defendant's right to be present at trial "is a condition of due process to the extent that a fair and just trial would be thwarted by his absence, and to that extent only." *Snyder v. Massachusetts*, 291 U.S. 97, 107-08 (1934), *overruled on other grounds*, *Duncan v. Louisiana*, 391 U.S. 145 (1968). It may therefore be significant that Cooper does not allege that his trial, even though disrupted from time to time by his behavior, reached an inaccurate or otherwise unjust verdict.

It has also been observed that the common law rule against trying incompetents arose during an era when there was no right to counsel in most criminal cases; accordingly, optimal mental acuity of the defendant was essential in order to raise a defense. Because counsel is now constitutionally guaranteed, the defendant's personal competency is now a somewhat less critical feature of a fair trial than it was at common law. Winick, 32 U.C.L.A. L. Rev. at 952-53. Given all of this, and without disputing the fundamental nature of the rule against trying incompetents, it appears that the constitutionally permissible presumption of competency, *Medina*, can be moderately strengthened. The "clear and convincing" standard for proving incompetency so strengthens that presumption, but not to an insurmountable degree.

In sum, the "clear and convincing" standard for proving incompetency to proceed does not erode the settled rule against trial of incompetent persons. Instead, it is a reasonable response to conflicting pressures, and difficult circumstances, that arise under modern law. Applied in the context of elaborate protective procedures, this proof standard

adequately protects the fundamental right to a fair trial. Therefore, it is constitutionally permissible.

CONCLUSION

For the foregoing reasons, *amici* believe that the judgment of the Oklahoma Court of Criminal Appeals should be AFFIRMED.

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December 1995

APPENDIX I

APPENDIX I

SUMMARY OF STATE STATUTES AND RULES GOVERNING COMPETENCY INQUIRIES: PROCEDURES, PROOF STANDARDS, DISPOSITION UPON INCOMPETENCY FINDING.

Overview: Incompetency inquiry uniformly is triggered by a low showing that defendant is incompetent to proceed (e.g., "reason to doubt"). The clinical portion of the inquiry typically may address issues other than incompetency to proceed (e.g., insanity defense-related issues), and uniformly generates written clinicians' reports. The ensuing judicial hearing is uniformly waivable if the parties agree with the clinicians' conclusions. Absent such agreement, the hearing is adversarial; clinicians may be called and examined by both parties, and other evidence bearing upon competency may be heard. Nearly every State provides for some form of limited commitment upon a finding of incompetency to proceed.

ALABAMA:
Competency inquiry required upon "reasonable grounds" to believe that the defendant may be incompetent. *Campbell v. State*, 484 So.2d 1168 (Ala. Crim. App. 1985); Ala. Code § 15-16-21 (1995). Inquiry includes examination and report by a mental health expert; hearing. Ala. Code §15-16-22 (1995). Judicial hearing: no information. Standard of proof: no information. If incompetent, defendant is committed to state hospital until restored to his right mind. Ala. Code § 15-16-21 (1995).

ALASKA:
Inquiry upon reasonable cause. Includes examination and report by at least one qualified psychiatrist; hearing. Alaska Stat. § 12.47.100 (1995). Standard of Proof: preponderance of evidence. If incompetent, may commit defendant for upon to 90 days for evaluation and treatment. Alaska Stat. § 12.47.110(a) (1995).

ARIZONA:
Inquiry upon reasonable grounds. A.R.S. Rules of Crim. Proc., Rule 11.3a. (Supp. 1994). Includes examination by two or more mental health experts, at least one of them a medical doctor; hearing. Standard of proof: no information. If found incompetent, defendant committed up to six months or until earlier attainment of competency. A.R.S. Rules of Crim. Proc., Rule 11.5b (Supp. 1994).

ARKANSAS:
Inquiry upon reason to doubt fitness to proceed. Includes examination by one or more psychiatrists or psychologists; hearing. Ark. Code Ann. § 5-2-305 (1993). Standard of proof: no information. If incompetent, may commit defendant to Dep't of Human Services for detention care, and treatment; or may release defendant if not dangerous. Ark. Code Ann. § 5-2-310 (1993).

CALIFORNIA:
Inquiry when doubt arises in the mind of the judge about defendant's competency. Cal. Penal Code § 1368 (1992). Inquiry requires examination by qualified expert; hearing. Cal. Penal Code § 1369 (1992). Standard of Proof: preponderance. Cal. Penal Code § 1369(f) (1992). If found incompetent, defendant committed to state hospital to restore competency. Cal. Penal Code § 1370 (1992).

COLORADO:
Inquiry when "substantial issue" of competency is raised. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980). Inquiry includes optional clinical evaluation; hearing. Colo. Rev. Stat. Ann. § 16-8-111 (1986). Standard of proof: preponderance of evidence. Colo. Rev. Stat. Ann. § 16-8-111(2) (1986). If incompetent, defendant ordered into custody of the Dep't of Human Services for treatment until such time as he regains competency; outpatient treatment permitted if the defendant is not charged with a violent offense. Colo. Rev. Stat. Ann. § 16-8-112 (Supp. 1995).

CONNECTICUT:
Inquiry when it "appears" the defendant is not competent. Conn. Gen. Stat. Ann. § 54-56d.(c) (1995). Inquiry requires examination by one or more specified mental health professionals; hearing. Conn. Gen. Stat. Ann. § 54-56d.(d) (1995). Standard of proof for incompetency: Clear and convincing evidence. Conn. Gen. Stat. Ann. § 54-56d.(b) (1995). If incompetent, and substantial probability exists that treatment will restore competency, court shall order placement of the defendant for treatment. Conn. Gen. Stat. Ann. § 54-56d.(h)-(i) (1995).

DELAWARE:
Inquiry upon "bona fide doubt" of competency. *Williams v. State*, 378 A.2d 117 (Del. Super. Ct. 1977), *cert. denied*, 436 U.S. 908 (1978). Type of inquiry: no information. Standard of Proof: preponderance; prosecution must prove competency. *Diaz, v. State*, 508 A.2d 861 (Del. Super. Ct. 1986). If incompetent, court may order the defendant confined and treated in a state hospital until competency is regained. Del. Code Ann. tit. 11, § 404 (1987).

FLORIDA:
Standard to require inquiry: no information. Inquiry includes optional examination by two or three experts; hearing. Fla. Sta. ch. 916.11(b) (1991). Standard of proof: no information. Upon a showing by clear and convincing evidence that the defendant meets criteria for civil commitment, he may be committed to a mental health facility for treatment. Fla. Sta. ch. 916.13 (1991).

GEORGIA:
Inquiry upon "plea" of incompetency or when "bona fide doubt" apparent. Georgia Code Ann. § 17-7-130(a) (Supp. 1995); *White v. State*, 414 S.E.2d 328 (Ga. App. 1992). Includes examination; hearing. Georgia Code Ann. § 17-7-130( ) (Supp. 1995). Standard of proof: no on-point information, but appears to be preponderance based upon insanity requirement in *Handspike v. State*, 45 S.E.2d 662 (Ga. 1947). If incompetent, committed to Dep't of Human Resources for limited period. Georgia Code Ann. § 17-7-130(b) (Supp. 1995).

HAWAII:
Inquiry when fitness to proceed is "drawn into question." Haw. Rev. Stat. § 704-405 (1993). Includes examination by three qualified examiners; hearing. Haw. Rev. Stat. § 704-404 (1993). Standard of proof: no information. If found incompetent, court shall commit defendant to appropriate facility for care and treatment. Haw. Rev. Stat. § 704-406 (1993).

IDAHO:
Inquiry upon reason to doubt fitness to stand trial. Inquiry includes examination by at least one psychiatrist or psychologist; hearing. Idaho Code § 18-211 (1987).

Standard of proof: no information. If found incompetent, court shall commit defendant to appropriate facility for care and treatment. Idaho Code § 18-212 (1987).

ILLINOIS:
Inquiry upon bona fide doubt of competency. Ill. Comp. Stat. Ann. ch. 725, para 5/104-11 (1993). *People v. Baldwin*, 541 N.E.3d 1315 (Ill. App. Ct. 1989). Includes examination by one or more psychiatrists or psychologist; hearing. Ill. Comp. Stat. Ann. ch 725, para 5/104-13; par 5/104-15 (1993). Standard of proof: prosecution must prove competency by preponderance of evidence. Ill. Comp. Stat. Ann. ch 725, para 5/104-11(c) (1993). If found incompetent, but competency can possibly be restored, treatment shall be ordered. Ill. Comp. Stat. Ann. ch. 725, para. 5/104-16 (1993).

INDIANA:
Inquiry upon reasonable grounds to believe the defendant is incompetent. Includes examination by one or two psychiatrists or clinical psychologists; hearing. Ind. Code Ann. § 35-36-3-1 (1994). Standard of proof: no burden rests on the defendant, but instead, trial court must satisfy itself as to competency or incompetency. *Wallace v. State*, 486 N.E.2d 445, 454 (Ind. 1985). If found incompetent, defendant committed to Division of Mental Health for six months or until he regains competency, whichever occurs first. Ind. Code Ann. § 35-36-3-2 (1994).

IOWA:
Standard that requires inquiry: no information. Inquiry and hearing requirements: no information. Standard of proof: preponderance of evidence. *State v. Rhode*, 503 N.W.2d 27

(Iowa Ct. App. 1993). Disposition if found incompetent: no information.

KANSAS:
Inquiry upon reason to believe defendant is incompetent. Includes optional clinical evaluation; hearing. Kan. Stat. Ann. § 22-3302 (Supp. 1994). Standard of proof: no information. If found incompetent, court may commit defendant to institution for treatment and evaluation for a specified period. Kan. Stat. Ann. § 22-3303 (Supp. 1994).

KENTUCKY:
Inquiry upon reasonable grounds to believe that the defendant is incompetent. Ky. R. Crim. Proc. 8.06 (1994-95). Includes examination by at least one psychiatrist or psychologist; hearing. Ky. Rev. Stat. Ann. § 504.100 (1990). Standard of proof: no information. If incompetent, court may commit the defendant to a treatment facility for a statutory period. Ky. Rev. Stat. Ann. § 504.110 (Michie 1990).

LOUISIANA:
Inquiry upon reasonable grounds to doubt capacity to proceed. La. Code Crim. Proc. Ann. art. 643 (West 1981). Includes mental examination by two or three physicians; hearing. La. Code Crim. Proc. Ann. art. 643, 644 (1981). Standard of proof: "clear preponderance of evidence" that defendant is incompetent. *State v. Gwinn*, 373 So. 2d 1304 (La. 1979). (Note: La. Code Crim. Proc. Ann. art. 648 (Supp. 1995) indicates "clear and convincing" proof standard; however, Louisiana Attorney General indicates that this applies only if original inquiry finds defendant competent.) If found incompetent, court shall commit defendant to a state mental institution for custody, care, and treatment for as long

as the incompetency endures. La. Code Crim. Proc. Ann. art. 648 (Supp. 1995).

MAINE:
Inquiry required upon "good cause shown." Includes examination by psychiatrist or psychologist; hearing. Standard of proof: no information. If incompetent, court may place the defendant in a mental health facility for observation, care and treatment. Me. Rev. Stat. Ann. tit. 15, § 101-B (Supp. 1994).

MARYLAND:
Inquiry if defendant appears incompetent or if defense alleges incompetency. Md. Code Ann. [Health-Gen.] § 12-103(a) (1994). Includes optional clinical examination; hearing. Md. Code Ann. [Health-Gen.] § 12-104 (1994). Standard of proof: competency must be proven beyond reasonable doubt. *Treece v. State*, 547 A.2d 1054 (Md. 1988). If incompetent, may be committed to mental health facility if dangerous to self or others until no longer incompetent or no longer a danger to self or others. Md. Code Ann. [Health-Gen.] § 12-105 (1994).

MASSACHUSETTS:
Inquiry upon doubt of competency. Mass Gen. Laws Ann. ch. 123, § 15 (Supp. 1995). Includes optional psychological examination; hearing. Mass Gen. Laws Ann. ch. 123, § 15(c) (Supp. 1995). Standard of proof: preponderance of evidence. Mass Gen. Laws Ann. ch. 123, §15(d) (West Supp. 1995). If incompetent, court may order a period of hospitalization for examination and observation. Mass Gen. Laws Ann. ch. 123, § 16(a) (West Supp. 1995).

MICHIGAN:
Inquiry if court is presented with information which would raise a bona fide doubt as to competency. *People v. Kearns*, 181 N.W.2d 548 (Mich. Ct. App. 1970). Includes mandatory examination by designated mental health professionals; hearing. Mich. Comp. Laws Ann. § 330.2030 (1992). Standard of Proof: discretion of trial court. *People v. Ritsema*, 307 N.W.2d 380, 383 (Mich. Ct. App. 1981). If found incompetent, and substantial likelihood found of gaining competence within specified time period, court shall order treatment. Mich. Comp. Laws Ann. § 330.2032 (1992). Such confinement for treatment shall not exceed 15 months. *People v. Miller*, 489 N.W.2d 60 (Mich. 1992).

MINNESOTA:
Inquiry upon "reason to doubt" competency. M.S.A. Rules Crim. Proc., R. 20.01.2 (1994). Includes examination by at least one medical examiner; hearing. M.S.A. Rules Crim. Proc., R. 20.01.2(3), 20.01.3. Standard of proof: "greater weight" of evidence that defendant is competent. M.S.A. Rules Crim. Proc., R. 20.01.3(6). If incompetent, variable dispositions available, including treatment, depending upon level of charged offense and other factors. M.S.A. Rules Crim. Proc., R. 20.01.4.

MISSISSIPPI:
Inquiry required upon "reasonable probability that defendant is incapable of making a rational defense." *Emanuel v. State*, 412 So.2d 1187 (Miss. 1982). Inquiry includes optional mental examination by a competent psychiatrist; hearing. Misss Code Ann. § 99-13-11 (1994). Standard of proof: Preponderance of evidence. *Griffin v. State*, 504 So.2d 186 (Miss 1987). Disposition upon incompetency finding: no information.

MISSOURI:
Inquiry upon reasonable cause to believe that the defendant is unfit to proceed. Includes examination by one or more psychiatrists or psychologists; hearing. Mo. Rev. Stat. § 552.020 (1994). Standard of proof: court must be "satisfied" that the defendant is competent. *Missouri v. Clark*, 546 S.W.2d 455 (Mo. Ct. App. 1976). If incompetent, court commits defendant to Dep't of Mental Health for up to 6 months; then another hearing is held to determine whether the accused is likely to regain competency. Mo. Rev. Stat. § 552.020 (1994).

MONTANA:
Inquiry upon written motion or if issue raised by trial court. Includes examination by any method accepted by medical or psychological professions; hearing. Mont. Code Ann. § 46-14-202 (1995). Standard of proof: no information. If incompetent, court commits defendant for treatment, with competency review in 90 days. Mont. Code Ann. § 46-14-221(2) (1995).

NEBRASKA:
Inquiry when it appears that the accused has become mentally incompetent. Includes medical, psychiatric or psychological examination; hearing. Standard of proof: no information. If incompetent, defendant committed to state hospital until competent. Neb. Rev. Stat. § 29-1823 (1989).

NEVADA:
Inquiry upon reasonable doubt of competency. *Jones v. State*, 817 P.2d 1179 (Nev. 1991). Includes examination by two examiners. Nev. Rev. Stat. Ann. § 178.415 (1992). Standard of proof: no information. If incompetent, may be committed

for treatment; outpatient treatment permitted if defendant not dangerous. Nev. Rev. Stat. Ann. § 178.425 (Michie 1992).

NEW HAMPSHIRE:
Inquiry upon "bona fide doubt" of competency, or "question of sanity." *State v. Zorzy*, 622 A.2d 1217 (N.H. 1993); N.H. R.S.A. 135:17 (1990). Nature of inquiry: no information (apparently guided by case law). Standard of proof: preponderance. *Zorzy*, 622 A.2d at 1219. If incompetent, defendant "evaluated for commitment" to mental health treatment. N.H. R.S.A. 135:17-a (Supp. 1994).

NEW JERSEY:
Inquiry upon reason to doubt fitness to proceed. Includes examination by at least one qualified psychiatrist; hearing. N.J. Rev. Stat. Ann. § 2C:4-5 (1995). Standard of Proof: preponderance. *State v. Otero*, 570 A.2d 503, 505 (N.J. Super. L. 1989). Commitment for inpatient treatment if defendant dangerous to self or others; otherwise, outpatient treatment permitted. N.J. Rev. Stat. Ann. §2C:4-6 (1995).

NEW MEXICO:
Inquiry upon reasonable doubt of competency. N.M. R. Crim. P. 5-602B (1992). Includes mental examinations; hearing. N.M. Stat. Ann. § 31-9-2 (1984). Standard of proof: preponderance or greater weight of evidence. *State v. Santillanes,* 580 P.2d 489 (N.M. App. 1978). If incompetent, commitment for treatment allowed; secure facility commitment permitted only upon clear and convincing evidence that the defendant is dangerous. N.M. R. Crim. P. 5-602B (1992); N.M. Stat. Ann. § 31-9-1 (1984).

NEW YORK:
Inquiry if the defendant "may be" incompetent. Includes examination by two qualified psychiatric examiners; hearing. N.Y. [Crim. Proc.] Law § 730.20 (1995). Standard of proof: Preponderance of evidence that defendant is competent. *People v. Breeden*, 115 A.D.2d 484, 495 N.Y.S.2d 715 (1985). If incompetent, may be committed for treatment up to 90 days. N.Y. [Crim. Proc.] Law § 730.40 (McKinney 1995).

NORTH CAROLINA:
Inquiry required upon motion. Includes examination by one or more medical experts; hearing. N.C. Gen. Stat. § 15A-1002 (1988). Standard of proof: no information. If incompetent, civil commitment or release ordered. N.C. Gen. Stat. § 15A-1004 (1988).

NORTH DAKOTA:
Inquiry upon reason to doubt competency. N.D. Cent. Code § 12.1-04-04 (1985). Includes examination by psychiatrist; hearing. N.D. Cent. Code § 12.1-04-06 (1985). Standard of proof: preponderance of evidence that the defendant is competent. *State v. VanNatta*, 506 N.W.2d 63 (N.D. 1993). If incompetent, may be committed to the state hospital, only so long as needed to determine likelihood of regaining competency; continued commitment must be justified by progress toward fitness to proceed. N.D. Cent. Code § 12.1-04-08 (1985).

OHIO:
Inquiry "if raised" before trial; during or after trial, inquiry only "for good cause." Ohio Rev. Code Ann. § 2945.37 (1993). Includes evaluation by one to three experts; hearing. Ohio Rev. Code Ann. § 2945.371 (1993). Standard of proof:

preponderance. Ohio Rev. Code Ann. § 2945.37. If incompetent but likely to regain competency, the court may order treatment up to fifteen months or 1/3 of the longest minimum sentence that could be imposed for charged offense; otherwise may refer to probate court for civil commitment proceedings. Ohio Rev. Code Ann. § 2945.38 (C)-(D) (1993).

OKLAHOMA:
Inquiry upon facts "sufficient to raise a doubt" of competency. Okla. Stat. Ann. tit. 22, § 1175.2A (1986). Includes examination by "doctors or appropriate technicians;" hearing. Okla. Stat. Ann. tit. 22, §§ 1175.3D, 1175.4 (Supp. 1995). Standard of proof: clear and convincing evidence of incompetency. Okla. Stat. Ann. tit. 22, § 1175.4B (Supp. 1995). If incompetent, commitment to state agencies (Human Services, Mental Health, or Substance Abuse), which may include confinement, depending upon likelihood of recovering competency, and dangerousness. Okla. Stat. Ann. tit. 22, §§ 1175.6, 1175.7 (Supp. 1995).

OREGON:
Inquiry required upon reason to doubt fitness to proceed. Or. Rev. Stat. § 161.360 (1993). Includes clinical examination by psychiatrists; hearing. Or. Rev. Stat. § 161.365(2) (1993). Standard of proof: no information. If incompetent, commitment to hospital or outpatient treatment, or other treatment suited to the defendant's condition. Or. Rev. Stat. § 161.370(2) (1993).

PENNSYLVANIA:
Inquiry required upon prima facie question of incompetency. Pa. Stat. Ann. tit. 50 § 7402(d) (Supp. 1995). Includes evaluation by at least one psychiatrist; hearing. Pa. Stat.

Ann. tit. 50 § 7402(e)(4) (Supp. 1995). Standard of proof: clear and convincing evidence of incompetency. Pa. Stat. Ann. tit. 50 § 7403(a) (Supp. 1995). If incompetent, court may order involuntary hospitalization and treatment if reasonably certain the treatment will restore competency. Pa. Stat. Ann. tit. 50 § 7402(b) (Supp. 1995).

RHODE ISLAND:
Inquiry if it justifiably appears that the defendant is incompetent. R.I. Gen. Laws § 40.1-5.3-3(c) (Supp. 1994). Includes clinical examination; hearing. R.I. Gen. Laws § 40.1-5.3-3(f) (Supp. 1994). Standard of proof: clear and convincing evidence that defendant is incompetent. R.I. Gen. Laws § 40.1-5.3-3 (Supp. 1994). If incompetent, involuntary commitment allowed for further observation or if the defendant is dangerous to himself or others. R.I. Gen. Laws § 40.1-5.3-3(i)(3) (Supp. 1994).

SOUTH CAROLINA:
Inquiry upon reason to believe that the defendant is incompetent. S.C. Code Ann. § 44-23-410 (1985). Includes examination by two mental health experts; hearing. S.C. Code Ann. § 44-23-420 (1985). Standard of proof: preponderance of evidence. *State v. Lee*, 264 S.E.2d 418 (S.C. 1980). If incompetent and likely to become competent, hospitalization for up to 60 days ordered. If unlikely to become competent, judicial admission proceedings are commenced. S.C. Code Ann. § 44-23-430(2)-(3) (1985).

SOUTH DAKOTA:
Inquiry upon reasonable cause to believe that the defendant may be incompetent. Includes psychiatric or psychological examination of the defendant; hearing. S.D. Codified Laws Ann. § 23A-10A-3 (Supp. 1995). Standard of proof:

preponderance. S.D. Codified Laws Ann. § 23A-10A-6.1 (1988). If incompetent, committed to custody of the human services center for treatment and observation as to whether he is likely to become competent. S.D. Codified Laws Ann. § 23A-10A-4 (Supp. 1995).

TENNESSEE:
Inquiry when defendant is believed incompetent. Includes examination by a mental health center or licensed private practitioner; hearing. Tenn. Code Ann. § 33-7-301 (Supp. 1995). Standard of proof: no information. If incompetent, may order involuntary hospitalization if there is a danger of harm to self or others and if treatment is in defendant's best interest. Tenn. Code Ann. § 33-7-301(5) (Supp. 1995).

TEXAS:
Inquiry required upon "some evidence" of incompetency. Tex. [Crim. Proc.] Code Ann. 46.02 § 2 (1979). Includes examination of defendant by mental health expert; hearing. Tex. [Crim. Proc.] Code Ann. 46.02 § 3 (1979). Standard of Proof: preponderance. Tex. [Crim. Proc.] Code Ann. 46.02 § 1 (b) (1979). If incompetent, hospitalization and treatment for the purpose of attaining competency. for a period of between 60 days and 18 months. Tex. [Crim. Proc.] Code Ann. 46.02 § 5 (1979).

UTAH:
Inquiry upon "bona fide" doubt of competency. Utah Code Ann. § 77-15-5 (1995). Includes evaluation through Dep't of Human Services by at least two mental health experts not currently involved in the defendant's treatment; hearing. Utah Code Ann. § 77-15-5(2)(a)-(8) (1995). Standard of proof: preponderance. Utah Code Ann. § 77-15-5(10) (1995). If incompetent, may be committed for treatment,

limited by likelihood of restoring competency in the foreseeable future. Utah Code Ann. §§ 77-15-5(11), 77-15-6(4), -(5) (1995).

VERMONT:
Inquiry if either attorney raises the issue, or the court has reason to believe the defendant may not be competent. Includes clinical examination; hearing. Vt. Stat. Ann. tit. 13 § 4817(b) (1974). Standard of proof: no information. If incompetent, hearing ensues to decide if the defendant needs treatment or hospitalization. Vt. Stat. Ann. tit. 13 § 4820 (Supp. 1995).

VIRGINIA:
Inquiry upon probable cause to believe the defendant is incompetent. Includes clinical evaluation by at least one psychiatrist, clinical psychologist, or master's level psychologist qualified in forensic evaluation; hearing. Standard of proof: preponderance. Va. Code Ann. § 19.2-169 (1995). If incompetent, court shall order in-patient or outpatient treatment to restore competency as appropriate. Va. Code Ann. § 19.2-169.2 (1995).

WASHINGTON:
Inquiry upon reason to doubt competency. Includes evaluation by two or more qualified examiners; hearing. Wash. Rev. Code Ann. § 10.77.060 (1994). Standard of proof: preponderance. If incompetent, may be placed in an appropriate facility for evaluation and treatment for up to 90 days, then judicial rehearing. Wash. Rev. Code Ann. § 10.77.090 (1994).

WEST VIRGINIA:
Inquiry upon court's belief that defendant may be incompetent. W. Va. Code § 27-6A-1(a) (1992). Includes examination by one or more psychiatrists or psychologists; hearing. W. Va. Code § 27-6A-1(a) - (c) (1992). Standard of proof: preponderance. W. Va. Code § 27-6A-1(d) (1992). If incompetent, may be committed to mental health facility for up to six months plus three-month extension if needed. Civil commitment referral if no possibility of regaining competency. W. Va. Code § 27-6A-2(b) - (d) (1992).

WISCONSIN:
Inquiry upon reason to doubt competency. Includes evaluation by one or more qualified examiners; hearing. Wis. Stat. § 971.14(2) (1993-94). Standard of proof: greater weight of the evidence that the defendant is competent to proceed; but if the defendant claims to be competent, the court will find him competent unless the state proves by clear and convincing evidence that he is not competent. Wis. Stat. § 971.14(4)(b) (1992). If incompetent, may be committed to Dep't of Health and Social Services for up to one year or maximum time which could be imposed as a sentence for the crime, whichever is less. If found incompetent to refuse treatment or medication, the court may order that the medication be administered or the treatment given. Wis Stat. § 971.14(5) (1993-94).

WYOMING:
Inquiry upon reasonable doubt as to competency. Wyo. Stat. § 7-11-303(a) (1995). Includes examination by qualified examiner; hearing. Wyo. Stat. § 7-11-303(b)-(f) (1995). Standard of proof: preponderance. *Loomer v. State*, 768 P.2d 1042 (Wyo. 1989). If incompetent: no information about commitment for treatment.

APPENDIX II

APPENDIX II

EXCERPTS FROM CONNECTICUT LEGISLATIVE HEARINGS RE: PUBLIC ACT NO. 81-365, SENATE BILL NO. 1066, AN ACT CONCERNING COMPETENCY TO STAND TRIAL (amending Conn. Gen. Stat. § 54-56d)

(NOTE: Full copies of this published legislative history, as provided by the Connecticut Chief State's Attorney Office, are lodged with this Court and provided to counsel for Petitioner and Respondent)

Judiciary Committee Hearing, 03 March 1981:

[p. 766]

DR. HOWARD ZONANA: Hello, I'm Dr. Howard Zonana, I'm the representative of the -- the legislative representative of the Connecticut Psychiatric Society and I'm also the Co-Director of the Lawrence Psychiatry Unit at the Connecticut Mental Health Center which performs competency to stand trial evaluations and I'm here testifying on Committee Bill 1066, the competency to stand trial bill.

This bill represents essentially the same bill which was introduced last year and for reasons which were not altogether clear to me because I don't think there was any substantial opposition to it. It was not dealt with in the last session. In the interim, as we had thought, the federal court declared the current competency to stand trail [sic] unconstitutional and this created a severe disruption in the courts --

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SEN. OWENS: Is this the judgement [sic] of the ruling of Judge Allen [sic: Ellen] Burns in the district court --

DR. ZONANA: -- In Deangelis vs. (inaudible) --

SEN. OWENS: -- did you get an opportunity to look at this bill 1066 so far as technical changes --

DR. ZONANA: Yes I have, and Attorney McCullough is here from the Commissioner's office has made a number of changes in the current bill to pick up some of the issues that were raised in Judge Burns' decision so that issues like probable cause which came up in that some defendants prior to arraignment have competency evaluations or that there should be probable cause that they committed a criminal act.

SEN. OWENS: You know this bill came to us, and obviously I was concerned because it had an impact and effect of the courts, particularly with respect to the 5440 [Conn. Gen. Stat. § 54-40] hearings. I suggested that the people who were interested in the changes sit down with Austin McQuiggan from the State's Attorney's Office and come up with a bill--do you know whether there's been any input by them on this bill?

DR. ZONANA: Yes, I think there has been. I'm talking more from both working on these from the front line in contrast to the insanity defense which gets a lot of publicity. The number of people effected [sic] by the competency to stand trial is substantially more and creates a greater impact. I would just like to say that in terms of the changes that are recommended in this bill, which Attorney McCullough will

detail for you, I would say that our group who does these evaluations, both as a team and as a psychiatrist individually, that basically I think most of these changes are all ones that we both support and have participated in and can live with and they basically cover the areas of probable cause and least restrictive alternatives that someone if found incompetent does not necessarily have to be incarcerated and if it is deemed feasible that they can respond to out-patient treatment and the issues of bail should not overlap with issues of treatment. The only things which raise some question have to do with the number of people who can observe and sit in on these evaluations and recommendations which would change from the bill here so that [p.768] it is now said that a psychiatrist or physician specializing in psychiatry can witness the evaluation or the defendant's attorney may also be present. Now, with the team, this can get to maybe five people in the room, which can undercut it, but I think it's basically something again that we can live with as long as it does not go beyond that.

It also raises the burden of proof to a clear and convincing standard which I think stems from the clear and convincing standard that the Supreme Court raised in civil commitment. I would prefer to answer questions to see where the hang-up in the bill came from last year so that hopefully we will not have a repeat of this because it certainly did create a difficulty in the court with just sending patients home with attorneys.

SEN. OWENS: Any questions of the Doctor? Thank you, Doctor. Let's go to Mr. McCullough please, since we're talking about this bill.

WITNESS MC CULLOUGH: My name is William McCullough. I'm an Assistant Attorney General and I represent the Department of Mental Health. I'm here to speak in behalf of Senate Bill 1066, An Act Concerning Competency to Stand Trial.

As Dr. Zonona mentioned, this bill is at this point a direct result of the DeAngelis vs. Plaut decision which declared portions of then Section 54-40 unconstitutional last fall.

SEN. OWENS: DeAngelis vs. ? --

MR. MC CULLOUGH: Plaut -- Commissioner Plaut of the Department of Mental Health. And also as the Dr. mentioned, this was the basic draft that was created some three years ago, although there have been many changes since then. I have participated in the drafting of this bill and --

SEN. OWENS: Who else worked with you on the drafting? Any other agencies --

MR. MC CULLOUGH: Okay, the original draft came out of a committee that Commissioner Plaut had created consisting of people **[p. 769]** from various agencies. That has undergone tremendous revisions since then. At this point, I have been trying to keep the State's Attorney's office involved --

SEN. OWENS: Who have you been working with in the State's Attorney's office?

MR. MC CULLOUGH: Okay, I have been sending all of the changes and all of the proposed drafts to I think it's Mr. Sabo

of the State's Attorney's office, the Deputy State Attorney, and also to Mr. McQuiggan --

SEN. OWENS: Mr. McQuiggan's here. Did you talk to him today?

MR. MC CULLOUGH: I have not talked to him personally, no, but I have sent him drafts of all of the proposals.

SEN. OWENS: Now, really, this bill shouldn't -- this bill obviously what we're trying to do is clear up a constitutional question that has resulted as a result of Judge Burns' decision. And I just want to make sure that the people that will be defending the bill, you know, the problems as they come up, will really be people from the prosecutor's office from the Chief State's Attorney's office. So, I would like to have -- I thought that there had been a consensus and that you would have been able to sit down and say, this is a bill that the law enforcement people agree to and so forth and it meets all of the criteria and all of the changes as suggested by Judge Burns' decision. I just don't want to get into the committee -- you know what you're going to do? I'll put it on the table for you. You're going to end up losing the bill unless you come in here and you say that it's been worked out, that the State's Attorney can agree to this, I can agree to it and so forth. Otherwise, if you can't, then it's going to be Very hard for laypeople to sit down and put it together also.

MR. MC CULLOUGH: I've been attempting for the past year and a half to get the State's Attorney's office to give me some of their suggestions or objections. I've gotten some information from various people in the staff. I've attempted to keep them up-to-date as to what I have done. We have had meetings with the Judicial Department. They have made

recommendations **[p. 770]** that have been incorporated in what I'm going to give you. And as I said before, the Attorney General's office and the Department of Mental Health have also been helpful.

The case, the DeAngelis v. Plaut case, was my case. I was involved with that and as far as --

SEN. OWENS: I didn't mean to cut you off -- go ahead.

MR. MC CULLOUGH: To answer your question, I think that I've done everything I could to get the State's Attorney's office involved. Now, if they have -- they have not given me any information other than an letter that I got today with some objections which I got straightened out with Attorney Derrington, who has testified earlier, he's still here by the way and would like to testify on this bill.

SEN. OWENS: Oh, he is going to testify -- Derrington, Mike Derrington? Is he still here?

MR. MC CULLOUGH: Was here. The bill clarifies and simplifies the language of the statute. It also incorporates all of Judge Burns' requirements. Now, the State's Attorney's Office I believe has some question about a couple of provisions dealing with the placement of certain things in the bill. I have no objection to their interpretation as to how that should be.

I would like to point out that the clear and convincing standard that is in the proposal came out of the Supreme Court's decision in Mattington [sic: Addington] vs. Texas dealing with the standard that's required for civil commitment. I have, by the way, the proposal that you have

was based on an earlier draft. I have changes since then which I have highlighted as to what should be in the bill as it now should read.

SEN. OWENS: I wonder, could you sit down with Mr. McQuiggan or a representative of his office sometime and come up with a draft that's suitable to the prosecutor's staff and to the agency that you represent?

MR. MC CULLOUGH: I would be happy to. I've offered to do that in the past and nothing's come out of it.

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REP. TULISANO: We'll get somebody from the legislature (inaudi[]ble)

MR. MC CULLOUGH: By the way, I've worked with the Law Revision Commission on this also.

SEN. OWENS: Yeah, I sent over a letter to them and they said it was going to take another month to get the, you know, they were still looking into the thing.

MR. MC CULLOUGH: Mr. Dickland is here from the Law Revision Commission and I've been working with him on this. Any questions? I'll be happy to get together with anybody that wants to. I think this is important, and --.

SEN. OWENS: Mr. Gouer. Excuse me, Warren, do you have a copy of Judge Burns' decision with you?

: I don't have it with me, no, but I can get it. [to other business]